UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KLEEBURG, *et al.*,	:	16-CV-09517 (LAK)(KHP)
Plaintiffs,	:	
v.	:	
LESTER EBER, *et al.*,	:	500 Pearl Street New York, New York
Defendants.	:	January 8, 2020

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE KATHARINE H. PARKER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: BRIAN BROOK, ESQ.
Brook & Associates, PLLC
100 Church Street, Suite 8th Floor
New York, New York 10007

For the Eber Defendants: COLIN RAMSEY, ESQ.
Underberg & Kessler LLP
50 Fountain Plaza, Suite 320
Buffalo, New York 14202

PAUL KENEALLY, ESQ.
Underberg & Kessler LLP
300 Bausch & Lomb Place
Rochester, New York 14604

(Appearances continued on next page.)

Court Transcriber: SHARI RIEMER, CET-805
TypeWrite Word Processing Service
211 N. Milton Road
Saratoga Springs, New York 12866

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APPEARANCES (CONTINUED):

For Lester Eber and Wendy Eber:	JOHN HERBERT, ESQ. 96 Engle Street Englewood, New Jersey 07631
For Estate of Elliott W. Gumaer, Jr.:	ROB CALIHAN, ESQ. Calihan Law PLLC The Power Building, Suite 761 16 East Main Street Rochester, New York 14614

THE CLERK: Calling Case 16-CV-9517, Kleeburg v. Eber.

Counsel, please make your appearance for the record.

MR. BROOK: Good afternoon, Your Honor. Brian Brook for plaintiffs Dan Kleeburg, Lisa Stein, and Audrey Hayes. And with me at counsel table with the Court's permission is Dan Kleeburg.

THE COURT: Good afternoon.

MR. RAMSEY: Good afternoon, Judge. Colin Ramsey for the Eber defendants.

MR. HERBERT: Good afternoon. John Herbert for Lester Eber and Wendy Eber.

MR. CALIHAN: Good afternoon. Rob Calihan on behalf of the Estate.

MR. KENEALLY: Good afternoon, Judge. Paul Keneally on behalf of the Eber defendants.

THE COURT: All right. Good afternoon all of you.

We are here for oral argument on the various motions for summary judgment. By my read, plaintiffs have moved for summary judgment on Count 2 with respect to Gumaer and Count 4 with respect to certain transactions and with respect to certain claims for damages and/or equitable relief. Plaintiff has also moved to strike affidavits submitted by the Eber defendants.

The Eber defendants, as I understand their motion,

have moved for summary judgment and/or declaratory judgment as to several issues and argue that the Rooker-Feldman doctrine precludes plaintiffs from challenging the metro transfer and the foreclosure action; and that the breach of fiduciary duty claim in Count 1 is barred by res judicata and/or issue preclusion principles; and that Count 2, the breach of fiduciary duty claim, should be dismissed pursuant to the faithless -- should be dismissed as well; and also moving to dismiss Count 6 and 7 as duplicative of other counts; and lastly, that Count 10, the claim for indemnity for CMB's legal fees should be dismissed.

And then, Gumaer is moving for dismissal of Count 1, breach of fiduciary duty as to him; and dismissal of Count 2, again, breach of fiduciary duty as to him; and also dismissal of Count 7, the fraudulent concealment claim and claim for punitive damages and surcharge.

Have I accurately listed plaintiff's key motion points?

MR. BROOK: Well, I think it is a little complicated, part of it is because of the issue that the defense raises about the overlap between -- to some extent between the declaratory relief and certain others claims.

THE COURT: Yeah.

MR. BROOK: So as we had to sort of summarized is in the first sentence of our opening brief --

THE COURT: Right.

MR. BROOK: -- where we say that we're seeking Count 1 in part and also Count 6 in part. And that was --

THE COURT: Right.

MR. BROOK: -- primarily focused on the Alexbay transactions and the Metro transfer --

THE COURT: Right.

MR. BROOK: -- and a couple of other transactions --

THE COURT: Right.

MR. BROOK: -- that are sort of necessarily related to sort of re-establishing control of that company.

THE COURT: Okay. Have I accurately listed the main arguments by the Eber defendants?

MR. RAMSEY: You have, Your Honor.

THE COURT: And for Gumaer?

MR. CALIHAN: You have, Your Honor. I think the key issue between us on this motion is the Count 2.

THE COURT: Right. Okay. All right. And, lastly, with respect to the Ebers, have I accurately listed the arguments?

MR. HERBERT: Yes, Your Honor.

THE COURT: Okay. Great. So, one other question before we get started with argument, there's a jury demand in the case. Are there any claims to which the parties believe a jury trial would not be appropriate if the motions are denied?

MR. BROOK: I think that when it comes to certainly the manner of relief that is awarded, a jury trial for equitable relief is not considered appropriate. That said, I can't remember which rule it is.

THE COURT: That's the fashioning of equitable relief.

MR. BROOK: Right. And so, my understanding is that oftentimes courts will empanel the jury to provide essentially an advisory verdict. And I think -- so I don't think on any of the claims that we have here because we're primarily seeking equitable relief even as to the Gumaers, you know, the faithless servant doctrine, I'm honestly not a hundred percent sure if it's a jury trial, but I know for our purposes, we believe that that is something that is best tried by a judge because disgorgement or restitution which is how that relief is oftentimes characterized is equitable even if it ultimately results in a money award.

THE COURT: Right. But there is a jury demand. So what are -- I'd like to hear each of the defendants' position as to jury versus bench trial and the various causes of action.

MR. BROOK: May I add one additional point, Your Honor?

THE COURT: Uh-huh.

MR. BROOK: So to the extent of punitive damages

that are awarded though, I believe that that is something that would be appropriately submitted to a jury if everything else is resolved.

THE COURT: Okay.

MR. RAMSEY: Judge, I think that question to an extent is going to flow from some of the rulings the Court makes here as far as what we believe is appropriate or not as it were. From the Ebers' perspective, as much as we can have before a jury, that is the preference. I agree with Mr. Brook that equitable relief is obviously in the --

THE COURT: Right.

MR. RAMSEY: -- province of the Court. But generally speaking, if it can go to a jury, that's the preference.

MR. CALIHAN: I agree with Mr. Ramsey.

THE COURT: Okay.

MR. HERBERT: I believe I'm of the same view.

THE COURT: Okay. All right. There's a mix of legal and equitable issues, I understand. Okay.

So, what I'd like to do is divide oral argument by the arguments related to the different defendant entities. So I'd first like to address the arguments with respect to Gumaer. I think those are relatively succinct. And then we'll -- then we can address the arguments as to the Lester and Wendy Eber and then the Eber defendants, okay.

All right. So let's first start since they're cross motions for summary judgment, I'm going to ask the plaintiff to file for -- to argue first and then each side can get a surreply if you want, okay?

MR. BROOK: Okay.

THE COURT: So we're starting with Gumaer.

MR. BROOK: When it comes to Gumaer, the fundamental argument in our motion for summary judgment which I'll focus on since I'm going first here, and I'm not sure which of the arguments that were presented are really still going to be argued by their motion. It really comes down to the undisputed fact, at least there's no -- and I say undisputed because in the sense of no genuine dispute. Every person who has testified in this case including even people who just heard about it representing Canandaigua National Bank has asserted that Lester Eber was represented personally by Elliott Gumaer while Gumaer was a trustee of the trust.

There's also no dispute that that relationship was never disclosed to plaintiffs. And, in fact, if the Court recalls in the series of motions to compel in this case, when it was the first motion to compel, we didn't even have the engagement agreement that was signed in 2001 that makes explicit the fact that he was going to represent Lester Eber personally and in his capacity as CEO of the companies. That did not provide for him to represent the companies.

It was a representation of Lester individually, and that is a breach of his duty of Gumaer's duty of undivided loyalty because there are -- you know, looking at the case law, there are two context, two types of relationships in which courts most often talk about a duty of undivided loyalty to avoid conflicts of interest. And those are trustees with respect to their duties to the trust and lawyers with respect to their duties to their clients. And so to enter into the attorney/client relationship with a co-trustee and beneficiary without even telling so much as including the other beneficiaries of the trust or getting approval for it from the Surrogates Court somehow was to put himself in an impossibly conflicted position.

He could not do his job as a trustee under those circumstances because if he heard from Lester Eber something presented to him in confidence, that would have constituted a breach of trust. He could not report that without violating his duty to Lester. He would have been violating the attorney/client privilege potentially putting at risk his license. Now we don't know when his license elapsed. We assume it did at some point. There's been no evidence presented of when that was. I know he's not in the current state register, but he's also been deceased for a while at this point, too.

And I understand that there may be some reluctance

to find that he was Lester Eber's lawyer without him having been here to say it and in light of the fact that a lot of times the payments to him were characterized as for consulting. But on that note, it's worth remembering that that letter agreement, and the parties do not dispute this, also reflects that a single payment was to be made for Gumaer in his services both a consultant -- not just both, but as a consultant, as a director, as a trustee, and as Lester's lawyer. It was all lumped together, but the only payments that are reflected are consulting payments.

So it's clear from the record and it's beyond dispute, beyond any genuine dispute that those payments were both for the trust, for his role as trustee and his role as a director as well as for his role as an attorney because that's what the letter agreement makes clear. And so if there were any sort of dividing up of those payments, if we sought a single payment to him as a trustee or as a director, then perhaps the estate's argument that there is a genuine dispute here might have some merit to it, but there's just -- there's no evidence on that.

And even though, you know, this is our motion, he is the fiduciary here. And it is -- and there's incontrovertible evidence that there was a breach of that duty when he entered into this conflicted relationship. And, frankly, the burden must be on the estate not withstanding Mr. Gumaer's passing to

present some evidence to call into question the end of that duty of confidence. But as the Ebers themselves have testified, they believe that Gumaer continued to be their personal lawyer until the end, notwithstanding him having strokes. They thought that relationship never ended. And so his conflict continued for that entire period of time.

And I think one question the Court may wrestle with, and it's a fair one, is does this constitute just a breach of fiduciary duty or does it involve application of the faithful servant doctrine. Both -- you know, the faithful servant doctrine is sort of automatically applied to disgorge all compensation from the beginning of disloyalty which we contend was at the absolute latest when he signed this agreement conflicting himself and not getting that even disclosed. It doesn't matter that no demonstrable injury occurred later.

It's the same thing as if an employee signed a contract to, you know, get evidence or get trade secrets for a competitor but didn't act on it for three years. The compensation would be disgorged from the beginning of the demonstrable disloyalty. And so the fact that it was only 2007 when then injury started occurring shouldn't mean that that's when disgorgement occurs from.

Under the -- you know, and I think that the argument for not applying the faithful servant doctrine here is essentially that a trustee is not subject to it because he's

not an agent, but a trustee is more than an agent. The law says the trustee is a principal. The case relied on to say that, you know, it wouldn't apply is -- I can't remember the name of it, but I think Federal Insurance or something like that, and it's -- it involved independent contractors and the assertion that independent contractors aren't agents and, therefore, the duty of loyalty does not amount to -- you know, when there's a breach of the duty of loyalty, it doesn't amount to application of the faithful servant doctrine. And it makes sense.

I mean an independent contractor cannot bind to the company, just as an employer is not obligated to supervise the employee's conduct. And so there's a distance between an independent contractor and the employer or the principal that just doesn't exist even close to it in the case of a trustee. And the case law oftentimes talks in terms of trustees even though at least as far as the parties have been able to find, we haven't been able to find a case actually applying it to a trustee which I think is, if anything, evidence that the doctrine is working and at least when trustees are breaching their duties and it certainly happens a lot, there hasn't been anything close to this brazen where someone has literally, you know, obligated themselves to be unable to complete their role.

And I think, you know, there may be some arguments

made about, well, it wasn't substantial or something like that, but the fact is it's certainly a disqualifying interest. It wasn't disclosed. If it was insubstantial and they thought it would have been consented to either by the beneficiaries or by the surrogate, they should have gone that route. They didn't. And that relationship did not exist at the time that Alan Eber made this trust, and that's also important because when the settler knows of a conflict and it appoints the trustees nonetheless, then that's not a problem. But as Lester Eber testified, he had never even spoken with Mr. Gumaer before his father passed. So there was no dispute that Alan Eber and the trust document did not authorize this conflict of interest.

To the extent that, you know, the doctrine of or just general breach of fiduciary duty is applied in that case, there would be some discretion in terms of the amount of damages to be awarded. Sometimes courts have done half the fees. And I would not be surprised if Mr. Calihan argued that something less than full disgorgement is appropriate here because it was a -- you know, this was not a strict employment relationship and because there were services that were not separable, that were -- although they were a lump sum, they were not breach of trust.

So, for example, his services as a lawyer to Lester, that's not something where he was breaching a duty to

plaintiffs. But by the same token, and the reason why faithless servant doctrine applies or, you know, as a matter of law this Court can conclude that full disgorgement is nonetheless is appropriate is because that opportunity to be Lester's lawyer, it only arose because of his position of trust.

And, you know, I could have easily written a treatise on all the different trust law issues that are implicated by this case, one of which is the fact that typically a trustee cannot hire himself to perform services for the trust without disclosure and some sort of overriding concerns. And so, putting everything into context and especially in view of the Restatement rules, I think that it's really beyond question that at the minimum, there was a breach of fiduciary duty and a violation.

And, you know, it would be I think fine and appropriate to defer deciding whether that is full disgorgement or partial until later because regardless of what happens, we need an accounting of the full set of transactions. There is a period of several years where the evidence has just not been produced. We can infer what those amounts are, but ultimately, the benefit of an accounting is that it puts the onus on the fiduciary to account for it. And in the absence of that, you know, the period that's specifically missing is about 2006 to 2009.

You know, the Court could infer at that point that it was -- that the amount being paid was 40,000 versus the 22,000 which is what at some point in that period of time the trust payments were lowered down to. So I think that is an open question, and that's why we have not sought to have an award of damages in a specific amount at this time. But at least establishing liability and, you know, ordering that accounting, I think, is a good first step.

So -- and the reason why I do emphasize that is because I know this Court said they wanted to deal with Gumaer first, but -- and I will not dwell on it now, but there are reasons which I will get to later why we would -- why we have drafted the proposed order to focus on the Alexbay transaction and related issues. I was planning to inform the Court about that. There was an event and a separate lawsuit in Connecticut just yesterday that occurred that really put a clock on trying to essentially save the company here. And so that's why I'm more than willing to the extent that it helps this Court deal with fewer issues to say we would defer, you know, deciding the amount of damages or even the basis for calculating damages at this time if that would expedite the other proceedings.

THE COURT: Okay. What happened in Connecticut?

MR. BROOK: So, Eber Connecticut as Your Honor knows, is a going concern. The CEO is Lester Eber. The

president is Wendy Eber. It does business as Slocum & Sons

THE COURT: Right.

MR. BROOK: And a few Slocums are on the board. There was one Slocum who was the general manager of the company who managed the sales team and who -- you know, and I can present it to Your Honor now if you want to see it, but in one of the presentations that Wendy Eber and her lawyers prepared for PBGC about five years ago, he was described as one of two key employees of the company because he was essential to maintaining the relationships with suppliers, managing the sales team. And, in fact, his salary was even higher than Lester Eber's.

He left the company in September for a competitor. When I heard about this, my client Dan Kleeburg had only learned about it because he saw a Facebook post from John Slocum's wife congratulating him on his new job which was promptly taken down. And I had to go after these guys and find out what was going on. It turns out they had filed a complaint trying to get a preliminary injunction against John Slocum because he'd gone to work for a competitor in violation of a non-competition clause in his contract.

It kept getting delayed. I wanted to update the Court, but I also didn't want to jinx it because everyone wanted this non-competition clause to be enforced and I didn't really have anything other than speculation until yesterday

when that court entered a preliminary injunction saying that for six months, John Slocum cannot work for any other distributor in Connecticut.

THE COURT: Okay.

MR. BROOK: And last night --

THE COURT: And what was that, the state court?

MR. BROOK: That was state court, yes.

THE COURT: Okay.

MR. BROOK: And so, nonetheless, the company has lost one of its key employees. And John Slocum actually spoke with Dan Kleeburg last night. And although, you know, we don't have like a contract or anything like that, we don't have any authority on behalf of the company here yet, but the discussion occurred about whether John Slocum if Wendy Eber was no longer there because his lawyer and John both said Wendy Eber unfortunately was the reason why he left, that if she was gone and we had control, he would consider coming back to the company. You know, and I think he would be very interested.

You know, and that's ultimately -- you know, it's created a situation that we did not anticipate where the company's future really is in flux, and the two key employees, Lester Eber and John Slocum, you know, they're not going to -- if we don't get some quick relief and have the ability to try to get John Slocum back, you know, the future of this company

is very much in question because Lester Eber's in his eighties. And John Slocum, the closer we get to that six-month deadline occurring, the hard it's going to be to really -- I think the more expensive at least it's going to be for the company to try to bring him back into the fold.

You know, I don't know. I mean we certainly would hope that the Ebers might try somehow to get him back, but he seemed to be --

THE COURT: Okay.

MR. BROOK: -- indicating otherwise.

THE COURT: I just wanted --

MR. BROOK: Sure.

THE COURT: That's sufficient information. Okay. Now, let's hear from Gumaer. So Mr. Calihan.

MR. CALIHAN: Thank you, Your Honor. Two things that Mr. Brooks said I would like to address briefly just -- the first, he made a reference to the Restatement I think as he was closing. I actually spent some time recently looking through the Restatement Second and Third, not for the first time, Restatement of Trusts. I could not find any mention of the faithless servant doctrine. Perhaps I missed it.

There is, however, the Restatement Second, Section 243, which addresses how and when a court may reduce compensation to a trustee for breach of trust. And it provides for the consideration of five or six elements, and it

is discretionary. That is the standard that should apply here in lieu of the faithless servant doctrine. And I actually would request permission to submit a one- or two-page letter brief just bringing that citation to the Court's attention.

This is an important issue here because what they are seeking by using the faithless servant doctrine is to recover all compensation from 2001 through the end of the relationship, whatever it was, whereas, if as we believe is the case if you're going to start talking about warning backs and compensation, you have to look at actual active breaches with damages. They've admitted, may not agree right now, but that probably starts in 2012. Tremendous difference in the size of the claim, and that's why this is so significant.

So let me back up for a moment. We are not contending, as I think I just suggested, that there are not legal principles upon which compensation can be claimed, a trustee compensation can be claimed. We're saying that the faithless servant doctrine is not one of them. They have invoked it because they want to get everything, and they have invoked it because they want to get everything on a minimal showing. That's their choice. But the fact is that that is not a claim that belongs here.

Now let me back up and look at the elements of that. The first point obviously is was Mr. Gumaer Lester's attorney. I stand here obviously at something of a disadvantage. I

could never ask him that question. I don't know the answer to that question in all honesty. However, what we have here is the plaintiff is standing up and on the basis of the same evidence upon which it argued months ago that there was not such a relationship when it was trying to recover the documents allegedly privileged, now the plaintiff is arguing that that evidence establishes that there was that relationship. I submit that at a minimum that demonstrates that there is at a minimum an issue of fact about it.

They rely on what Lester Eber had testified to, for example. And there are two problems with that. Number one is Your Honor noted in your decision and as other case law supports the view of the putative client while relevant is not dispositive. Also, I think in an actual trial where we would have the ability to invoke the dead man statute, it would be very difficult to establish this relationship through such testimony. And I think the dead man -- the public policy behind the dead man statute fits here where counsel has to stand up and say I don't know what the actual answer is, but they have to have the burden of establishing it under this situation. Mr. Gumaer is not here to defend himself.

And as I also recited in my papers and I won't go through it in detail, but Your Honor has already reviewed the evidence. And while I mistakenly said to you and made a final finding because I'm not very good at footnotes and I

apologize, nonetheless, at a minimum that review and how you weighed that evidence and we've recited it in our papers and we made sure all of the evidence was back in the record, again, it creates an issue of fact not suitable for resolution here, particularly when you have the dead man statute sort of hanging out there.

Now let me talk about this notion that there is a per se conflict. We cited interesting case law which stood for the proposition that an attorney representing a trustee takes on the same obligations to the trust as that trustee. And that's interesting because that means there cannot be as a matter of law an inherent conflict in that relationship. The law recognizes that when an attorney represents a trustee, it also -- it takes on those obligations to the trust. And if there was in fact an inherent conflict in that relationship, no attorney could represent a trustee. It has to be the case that as a matter of law there is not such a conflict.

THE COURT: You're talking about the duty as flowing to the beneficiaries of the trust --

MR. CALIHAN: Yes.

THE COURT: -- and any advice flows to the beneficiaries of the trust, those concepts. Is that right?

MR. CALIHAN: If I understand Your Honor's question, yes. It is that the attorney takes on all the legal obligations of the trustee to the beneficiaries of the trust.

And so when Mr. Gumaer if he became Lester's personal attorney, by virtue of doing so, he took on all of Mr. Eber's trustee obligations but he already had those same obligations. So there can't be a conflict there. And --

THE COURT: Well, if he was Mr. -- I guess my question is in what capacity was Mr. Gumaer acting as Lester Eber's attorney if he was acting in such a capacity because if he's acting in the capacity as attorney to Lester as a trustee, I understand. But if he's serving as a personal attorney to Lester as something else such as an owner of Alexbay, that's a different situation.

MR. CALIHAN: Well --

THE COURT: He may be wearing two hats, two different attorney hats.

MR. CALIHAN: Well, I would suggest in fact maybe that's not the case because --

THE COURT: Okay.

MR. CALIHAN: -- to the extent that he was advising Lester on anything having to do with a trust, I think the law that clearly says that when an attorney advises a trustee, he takes on the same obligations. As soon as you step into that area where he is advising Lester of any related issue, he has the same obligations.

And I think the example that's been raised which has to do with confidential information is an interesting one. If

Mr. Eber shared with Mr. Gumaer information related to the trust to which Mr. -- for which Mr. Eber had an obligation to share with the beneficiaries, Mr. Gumaer as a matter of law had the same obligation. It came with the relationship as a matter of law. It came with his stepping into the shoes of advising Mr. Eber. So in fact, there's no conflict there.

And I go back to my original example, if you will. There's a conflict there. There's a conflict when an individual attorney represents -- who is not a trustee represents a trustee and the trustee shares with that attorney information that should be disclosed to the beneficiaries. The law says that that attorney assumes the same obligations as a trustee and, therefore, they both have to disclose that information. There simply isn't an inherent conflict --

THE COURT: So you're saying --

MR. CALIHAN: -- as a matter of law.

THE COURT: So are you also saying that as a matter of law the duty of confidentiality runs to the trust or the beneficiaries of the trust and, therefore, it's not a violation of professional -- the professional code of conduct?

MR. CALIHAN: I'm saying the duty of disclosure. The duty of disclosure. If there was information as to which Mr. Eber had an obligation to disclose it to the beneficiaries and if Mr. Gumaer was advising him in that realm and obtained that information because Mr. Gumaer put aside his independent

status as a trustee solely by virtue of his being Lester's attorney advising him on matters pertaining to the trust, he has the same obligation of disclosure. So there cannot be a per se conflict.

Can the obligations be violated? Yes. Can there be individual breaches of duty? Of course. But there's not this inherent conflict --

THE COURT: Okay.

MR. CALIHAN: -- here. And it is notable that the plaintiffs' counsel, I know they were going to contest his competence after all these months, has not cited a single on-point case which stands for this proposition.

THE COURT: Okay.

MR. CALIHAN: So, in essence, they're asking the Court to establish as a matter of law a conflict, a rule of conflict applicable to attorneys who are advising trustees because if there is a conflict here with respect to Mr. Gumaer, there is necessarily the same conflict with any individual attorney representing a trustee in connection with matters involving the trust.

THE COURT: All right. So you're saying that this issue as a matter of law, there's really no facts -- there's no factual dispute that is pertinent to the Court's resolution of this issue of law?

MR. CALIHAN: Yes, if I understand your question.

THE COURT: Right.

MR. CALIHAN: Yes.

THE COURT: Okay.

MR. CALIHAN: Yes, I think so.

THE COURT: Okay.

MR. CALIHAN: With respect to the application of the faithless servant doctrine, I think I've already addressed that but simply there's no direct -- I mean they're unable to find direct on-point case law. There are other bases for seeking liability here, for seeking damages, but this doctrine clearly applies to agents and employees. Courts time after time after time have said that the kind of analysis that's set forth in Section 243, the Restatement Second, and other case law is the applicable one here.

THE COURT: Okay.

MR. CALIHAN: And that analysis can resolve in a wide range of damages here. We obviously argue that it shouldn't, but what we're talking about now is the application of the faithless servant doctrine based on his being an attorney and based on there being an inherent conflict of interest. And we're saying the doctrine doesn't apply. There was a material fact issue as to his status as an attorney. And there is no such thing and cannot be any such thing without really changing the law of trusts and how attorneys go about representing trustees if this relationship created an

inherent per se matter of law conflict.

THE COURT: Okay. Thank you.

MR. BROOK: May I address a few points?

THE COURT: Yep, you may.

MR. BROOK: Thank you, Your Honor.

I'll start with the Restatement. And I'm not at all surprised that the Restatement doesn't mention the faithless servant doctrine because the faithless -- the Restatement's purpose is to be a restatement of the law, the general common law of the United States. And the faithless servant doctrine was invent in New York and has not been adopted widely in a lot of states in the United States. So if the Restatement included the faithless servant doctrine, that would be an anomaly. And again, as noted before, I mean going back to, you know, the nineteenth century when the doctrine was invented, it talked about this in terms of duties to trusts and trustees.

And, in fact, there was the -- I'm going to get the citation here, but the case Federal Insurance Code v. Merck's in which that -- that's one in which both parties have cited simultaneously. I don't know which version of an opinion Mr. Gumaer's -- or Mr. Calihan's brief is referring to since it talked about us citing the wrong page. And I really think I cited to the right page on that. I don't see anything even 15 pages long, but that case specifically distinguished between

application of fiduciary -- finding a fiduciary relationship that creates a faithless servant doctrine application versus one that -- and said that that's where it arises by law. And it gave the examples of a higher degree of accountability such as lawyer/client, trustee trust/beneficiary, shareholder officer/director, employer/employee, et cetera, and explicitly distinguished that.

So the fact that it hasn't been expressly applied to a trustee doesn't mean that New York law isn't clear that it should. And it can be decided and it should be decided by this Court because the trustee/trust relationship is the most fundamental situation where there is a duty of loyalty. It is not just a duty of loyalty like in the employer/employee context. It is a duty of undivided loyalty.

THE COURT: Okay. But even if that doctrine did apply, isn't there a factual issue as to whether Gumaer served as an attorney for Lester Eber and what -- how do you address the fact that there's not necessarily a conflict of interest if he's a trustee and representing a trustee advising on the trust? What's the conflict there?

MR. BROOK: Let's deal with that second part first because I think that's where -- summary judgment standard requires the non-movant to come forward with some evidence to show that there's a genuine dispute. And there's no evidence anywhere indicating that Gumaer ever represented Lester Eber

in his capacity as a co-trustee of the trust. None. The engagement agreement does not say that. There's simply no precedent whatsoever for one trustee to represent the other co-trustee with legal advice.

And it makes sense. When the Restatement says that one of the roles that a trustee has when there are multiple trustees is to monitor the co-trustee and to report and to act on breaches of duty. And that is a duty that cannot be carried out when there's a personal relationship. And even assuming that there were some evidence sufficient to go to a trial on whether he represented Lester in his capacity as trustee. It would still be a per se violation.

And it's telling that despite the fact that there are multiple trustees, and trustees are frequently lawyers, that there is no precedent that anyone can find for a co-trustee to act as a lawyer for another co-trustee in any capacity. It is an inherent conflict of interest. And I think that, you know, the fact of the very privilege dispute that have unfolded here before shows why. If he was providing that attorney/client advise to Lester, I mean there needed to be a conflict waiver and disclosure saying, you know anything you tell me I'm going to have to tell to the trust beneficiaries.

I don't think that's a correct statement of the law. I think that there's actually carveouts that are applicable

when someone is an attorney to an trustee under certain circumstances that if they're getting advice on how to deal with the beneficiaries, for example, to ensure that their fiduciary duties are being met, that's not subject to the fiduciary exception, for example. So this notion that a lawyer, you know, could never represent a trustee without a conflict I think is just wrong as a matter of law. It absolutely is something that's permissible, and it is an inherent conflict for the person to be a co-trustee and to represent another co-trustee.

But, again, there's no evidence that it was in that capacity. And the absence of any evidence means that there's no triable issue of fact. We can't just sit here and speculate. The engagement agreement says what it says. We have been provided with a number of different documents in which there were discussions about business matters, and none of those indicate such a relationship.

I want to briefly address the characterization of our past argument as there being no relationship. That's not correct. We did not argue that there wasn't a personal attorney/client relationship between Lester and Gumaer. Our arguments were two-fold. There's probably a few more sub arguments, but mainly Gumaer because he had these duties directly to the trust beneficiaries, Lester had no reasonable expectation that he could maintain his confidences and,

therefore, any disclosure to Gumaer required disclosure to the plaintiffs. That's not saying there was no relationship.

In addition, we were arguing that Gumaer was not providing legal advice and we based that in part on some of the things that had been disclosed to us in discovery and the fact that he was a director and a trustee. And that doesn't necessarily implicate legal advise. We never, especially -- I know once we got that engagement agreement, we never said that that engagement agreement wasn't real. In fact, we folded it into our complaint as soon as we did. So it's a mischaracterization to say that we ever argued certainly with the evidence that we now have that there was no relationship at all.

THE COURT: Okay.

MR. BROOK: It was a personal one. Finally, just the dead man statute, there's no reason -- this is the first that we're hearing of this in this motion. There's no reason why that would need to wait until trial. If there was a dead man statute issue that made some of the evidence that we've submitted inadmissible, that could have been raised at summary judgment and it wasn't. So I think that for purposes of summary judgment, the dead man statute and the possibility of making evidentiary objections later should not be considered by this Court.

THE COURT: Okay. Anything further, Mr. Calihan?

MR. CALIHAN: No. I'll rest on what I --

THE COURT: Okay.

MR. CALIHAN: -- the points I've made.

THE COURT: All right. Thank you. Okay. So now let's move to Lester and Wendy Eber. To mix it up, let me hear first from the Ebers concerning their motion and then I'll hear from Mr. Brook and then you'll each have a chance to surreply. How's that?

MR. CALIHAN: May I be excused then?

THE COURT: You may be excused if you wish, but you may want to be -- you may be interested in the arguments.

MR. CALIHAN: I'll stay.

THE COURT: Okay.

MR. RAMSEY: Judge, Mr. Herbert and I have attempted to divide and conquer. I don't know if there's particular issues you want to take them in a particular order.

THE COURT: Oh, okay. So you -- so which --

MR. RAMSEY: So we've kind of divided amongst ourselves.

THE COURT: Fine.

MR. RAMSEY: If there's an issue the Court wants to tee up, great. I can start with what I was going to address and if the Court wants to jump ahead --

THE COURT: Tell me what issues you're going to address and --

MR. RAMSEY: I'm planning on addressing the issue with the Southern Consulting agreement which is also raised -- they're essentially overlap between the plaintiffs' motion and the Eber defendants' motion on that point.

THE COURT: Yep.

MR. RAMSEY: I'm also going to address the Rooker-Feldman issue, the res judicata issue, the duplicative counts issue, and the common law indemnity claims --

THE COURT: Okay.

MR. RAMSEY: -- issue. Mr. Herbert's going to address broadly speaking issues with the stock and the issues with the Metro transfer and the "no further inquiry" rule which is implicated by all of that.

THE COURT: Okay. So, Mr. Ramsey, why don't you go first on these issues. Then I'll hear from Mr. Brook and then you'll each have a chance to reply. And then I'll hear argument from Mr. Herbert on the points that you're going to be arguing and --

MR. RAMSEY: Very good.

THE COURT: -- so we'll take it that way.

MR. RAMSEY: Perfect. So let me start, Judge, with the whole issue surrounding the Southern Consulting agreement.

THE COURT: Yeah.

MR. RAMSEY: We've moved on the -- and that's raised in two of plaintiffs' causes of action. We've moved

affirmatively on the faithless servant doctrine aspect of that. If I'm reading Mr. Brook's motion correctly, his is more focused on the usurpation of a corporate opportunity. I think reading the motions together, they're almost interchangeable. So where the Court lands on one, I think whether it's usurpation of a corporation opportunity to faithless servant, either if there's a question of fact on both, one side wins on both, the other side wins on both.

So I'm going to treat it in that respect. I think we can fold them together --

THE COURT: Okay.

MR. RAMSEY: -- for the purposes of the argument. Basically what plaintiffs' argument is Lester entering in this consulting agreement with Southern, either usurped to cover opportunity or made them a faithless servant. And I think we can agree that the standard that the Court's looking at there is was there a reasonable expectation, was there a tangible expectancy for one of the corporate entities to obtain this consulting work from Southern.

And in order to analyze that, we've got to go back to the operative time period. Lester signs this agreement in late 2007. What's going on in late 2007? Eber Metro, Eber Wine & Liquor are out of business for all intents and purposes. They've been driven out of the New York market by Somer Wine & Spirits. They're not actively in business in any

capacity in which can reasonably said to be conducting business. There's simply nothing for Lester to be competing against vis-a-vis either corporation at that point. The writing unfortunately was on the wall for their prospects in the New York market. That's point one.

Point two, neither corporation had ever done any type of consulting or lobbying work. They simply didn't. They weren't in that line of business. So in our view, those two points alone are enough to knock those claims out. You weren't -- the companies weren't in business. They never performed the type of business that Lester entered into this consulting agreement with Southern to perform services for.

We've got a third strike here. We've got the explicit testimony of one of the bigwigs at Southern who testified in this case that he was responsible for facilitating, for negotiating this consulting agreement. He wasn't interested in Metro. He wasn't interested in Wine & Liquor or Southern wasn't. They were interested in Lester Eber, Lester Eber's unique sets of skills, Lester Eber's contacts in this world, Lester Eber's experience in the wine and liquor business in New York, his acumen. He could not have been clearer that, look, I'm not interested in entering into some contract with some corporate entity where if Lester leaves, passes away, et cetera, that I'm stuck with this corporation that's meaningless to me. Lester's personal

contacts were what they were after.

THE COURT: But under the faithless servant doctrine, the idea behind that doctrine is that the individual is taking on a role for a competitor that undermines or to the disadvantage of the entity to which he has a duty. And so, how do you address the argument that Lester still had a duty to those Eber entities at the time he entered into the consulting agreement and why do you say the consulting he was providing didn't disadvantage the Eber entities?

MR. RAMSEY: The primary reason, Judge, is there was nothing to compete with anymore in New York. Those companies weren't doing business in New York. That's the long and the short of it. I think there's a different issue here if Lester's performing the same services in Connecticut, for instance, which he wasn't. That's different. I think that raises some thornier problems. But the reality on the ground which kind of throughout the case and throughout the summary judgment motion the plaintiffs really disregard is the economic reality, the business reality on the ground that there was nothing to compete with at this point.

THE COURT: So was it your contention that there are no issues of material fact with regard to whether these two New York Eber entities were defunct, not transacting business in New York?

MR. RAMSEY: I don't think there's any dispute they

weren't transacting business. Were they defunct in the legal sense? They were still going concerns primarily because they had so many creditors. But certainly, they weren't conducting business. I don't think that's a -- there's a dispute that they were selling booze.

THE COURT: They weren't selling liquor --

MR. RAMSEY: Yeah.

THE COURT: They weren't selling liquor. They weren't earning revenues, and there's no dispute as to that.

MR. RAMSEY: Exactly. They weren't selling it, and as I said before, they'd never been in the consulting business. So in our view, this is ripe for summary judgment. Again, we've moved on this issue as did plaintiffs. It's ripe for summary judgment for us at the very least if the Court's not inclined to go that direction, at the very least, there's a question of fact with respect to plaintiffs' motion on that point.

The next issue, if we can move on, Judge, is the issue of joint and several liability on the pension liabilities, the Wine & Liquor pension plan and the Teamster pension liability. Unless I completely misread plaintiffs' opposition, they don't dispute that there was joint and several liability between -- on the part of Metro and Wine & Liquor. They say, hey, it's irrelevant, it doesn't matter, you're looking at this the wrong way. But they don't actually

dispute that there's joint and several liability.

And we can fight about what the import of that is, I suppose, down the line. We fight about everything else in this case. But, again, unless I'm missing it and I'm sure Mr. Brook will tell me if I am, the narrow issue of was there joint and several liability is not contested by plaintiffs.

THE COURT: Well, isn't that something that the PBGC would have dealt with already, and that case was settled?

MR. RAMSEY: Absolutely, Judge. The PBGC has certainly weighed in that all the more part of the control group that there was joint and several liability.

THE COURT: So why is that not controlling? Why is that something that I even have to decide?

MR. RAMSEY: Because plaintiffs apparently -- again, my understanding that the argument is plaintiffs do not accept or at least are raising some issue whether or not joint and several liability was applicable, at least before the motion. And --

THE COURT: Mr. Brook, are you contesting this?

MR. BROOK: Here's the situation. This Court ruled that the PBGC litigation was irrelevant and said that we couldn't get documents regarding attorney/client communications about that litigation --

THE COURT: Right.

MR. BROOK: -- and what their position was. In

terms of valuating the company if we go to that stage for 2012, the valuation analysis looks at what the condition was at the time. The PBGC decision was issued in 2016. As a general rule, you don't use hindsight, so there's no dispute that, yes, the Ebers lost that case. The court refused to consider not only the Honestbay transaction but the earlier [indiscernible] deal and set an earlier date. We love that decision. I still don't understand how this helps them.

The only thing that's relevant for purposes of establishing valuation and possibly good faith is what did the Ebers believe or other parties believe at the time in question. So this 2016 decision, it doesn't have anything to do with anything. The fact that --

THE COURT: Okay.

MR. BROOK: -- anyhow.

THE COURT: So you're not contesting joint and several liability per se. You're just saying it's not relevant?

MR. BROOK: It's not relevant.

THE COURT: Okay.

MR. BROOK: And there is -- and to enter judgment on that basis, I think --

THE COURT: Okay.

MR. BROOK: -- as long as it's clearly not a --

THE COURT: You can make this argument.

MR. BROOK: Sure.

THE COURT: -- when you --

MR. BROOK: I apologize.

THE COURT: -- when it's your turn. So, Mr. Ramsey, can you explain to me why joint -- why this Court even needs to address this issue?

MR. RAMSEY: Because assuming this case goes forward, completely disposed of one way or the other on these motions -- which I think even if we all got everything we wanted, I think it would still be going forward -- there's a potential if not a likelihood that we're going to be talking about when were these companies insolvent, were they insolvent, what was the impact of that. And one of the primary issues here, one of the primary contentions we have is this joint and several liability is what either led to or certainly significantly contributed to the insolvency that then was the precursor to many of the actions that took place.

So I know there's certainly a question of fact on the insolvency issue which is why neither party moved on it, but we do feel it's important that the joint and several liability's recognized because of the impact it has on the company's, the assessment of the insolvency issue.

MR. HERBERT: Can I add something to that point? Just to be clear, in 2012, they're two different potential ERISA liabilities here. There's one withdrawal liability from

the multi-employer plan to the New York State Teamsters.

THE COURT: Right.

MR. HERBERT: That liability was already mature in 2008. So there was most definitely joint and several liability of all these companies, all the companies in 2012. So that's not really contested.

THE COURT: Okay. So --

MR. HERBERT: But the rest of it as he just explained, there's really two issues. One is how does the joint and several liability of the companies impact their solvency in 2012.

THE COURT: Okay. I understand.

MR. HERBERT: But there's another one. Two is how does it affect the value of Eber Metro for purposes of comparing that value with the outstanding balance of Lester --

THE COURT: I understand. But, Mr. Ramsey, since you're addressing this point, why does it need to be resolved now if it's wrapped into the insolvency issue? This is just a -- isn't it just a factual issue of what the union said was the withdrawal liability and what the -- and ultimately what was paid? Because if there was a claim by the union for withdrawal liability, that was an amount of money that was being sought against the business. That's a factual issue that impacts the value of the company at that time and going forward until that is resolved, however it's resolved.

Likewise, to the extent there was an outstanding -- a second pension obligation, that's a debt or an alleged debt that was outstanding as of a certain date and however it got resolved, it gets resolved. But isn't the fact that just that there was this potential obligation something that impacts the value of the company and who its creditors were at that time? Why does this joint and several liability issue -- I just don't understand why that needs to be resolved now.

MR. RAMSEY: Certainly, I agree that the insolvency issue is a question of fact. The Court, however, as a matter of law can say, look, mathematical computations aside, they were seeking this amount, they were seeking that amount, whatever the amount is, I can concede that that's a question of fact, too. The joint and several liability itself that this was going to be an obligation of everyone in the control group, that could be decided as a matter of law.

Now, again, the import of that I suppose we can argue about, but it does clean up some of those issues as far as the insolvency if we say, hey, look, we can't dispute that there was joint and several liability here.

THE COURT: Well, it doesn't sound to me like Mr. Brook is saying that entities within a control group are not jointly and severally liable for an ERISA obligation. I think that's not a controversial issue. What he's saying is it's not relevant.

MR. RAMSEY: Well, his expert I think did in sum and substance say, hey, look, this wasn't a liability of all of the corporations. But if we're arguing over something that's not really an issue, all the better. I'm fine with that, Judge. Just the lead-up to this prior to the response to our motion, it was our understanding that it was being contested. If it's not, then I can certainly move on and be happy that it's not contested.

THE COURT: Okay. All right. So let's --

MR. HERBERT: Let me add another thing to that just for clarity. We're confusing joint and several liability with contingent liability. With respect to their pension plan --

THE COURT: Maybe you can argue -- if it's a different point for your argument, just to be clear, why don't you sit down. I'm going to have Mr. Ramsey continue his arguments and he can have a surreply if there's something else that needs to be addressed. But let's stick with the arguments Mr. Ramsey is --

MR. RAMSEY: Sure.

THE COURT: -- handling right now.

MR. RAMSEY: Okay. The next point, Judge, is the issue of the Rooker-Feldman doctrine.

THE COURT: Yeah.

MR. RAMSEY: And I think we're all on the same page that there's essentially four tenets that need to be satisfied

is this going to be applicable: that the plaintiffs lost or opposed the result in state court, they complain of injuries caused by the state court judgment, they ask this Court to review and reject at least in part that judgment, and that the state court judgment preceded this action.

Working backwards, I think the last one's the easiest. We can all agree that 2012 UCC proceeding preceded this, so no issue there. Next, did plaintiffs lose or oppose the result in state court and do they complain of the injuries caused by that judgment? In their motion, they say no. Essentially, look, Judge Rosenbaum's order is irrelevant. It doesn't have anything to do with what the relief we're seeking in this case.

That just doesn't square with the arguments that they're making. A significant portion of their third amended complaint references specifically the 2012 proceeding and everything that flowed from it. That order was really the genesis of Eber Metro going to Alexbay of the decision essentially affirming the validity of Lester's loans and the validity of the transactions, and the finding that the entire process was commercially reasonable.

So it's hard to square the circle when they're saying, hey, look, Judge Rosenbaum's order is completely irrelevant, that's not what we're moving under, when in this very motion they're asking this Court to return Metro to the

trust which, again, had its genesis in Judge Rosenbaum approving the UCC Article 9 proceeding allowing Alexbay to proceed with what it was seeking to do.

THE COURT: Well, I understand plaintiffs to be saying that that transaction harmed the trust.

MR. RAMSEY: Well, they're saying it harmed them. They're saying it harmed them as --

THE COURT: But they're also bringing claims derivatively on behalf of the trust. And I think they're saying that this transaction that the Court deemed commercially reasonable harmed the trust. What is your position as to whether it harmed the trust?

MR. RAMSEY: Well, I don't -- I think at that point there was, to put it bluntly, nothing left to harm vis-a-vis Metro. This goes back to the insolvency question. My understanding what their argument is is Metro leaving the trust harmed me as a plaintiff as a contingent beneficiary. That's what they're arguing here. And not to jump ahead, but Mr. Brook's comments about this action in Connecticut, ultimately, what they want to do is they want to take over Eber Connecticut. So they're saying, hey, look, this harmed me because all of a sudden Metro's no longer part of the trust. Me as a contingent beneficiary has been deprived allegedly of certain rights.

They're certainly asking the Court to review and act

with respect to what the state court did. They explicitly are seeking a rescission of that. So that really is to my way of thinking impossible to dispute that they're asking this Court to do that. And, again, just the sheer amount of time that they spent in this in the third amended complaint, it's inconsistent to say, hey, look, this whole Rosenbaum order doesn't mean anything to me. It's totally separate, totally irrelevant from what the relief that we're ultimately seeking.

THE COURT: Well, the trust -- at the point of the 2012 action and court decision approving the transaction, the trust itself had only the value of the businesses, whatever they were taking into account any liabilities, right?

MR. RAMSEY: Yes.

THE COURT: And I know there's a dispute about what that value is.

MR. RAMSEY: Yes.

THE COURT: So is it -- I'm just wondering whether or not there's an issue as to whether there's actually any injury from this whole transaction because that element, is that element of the Rooker-Feldman doctrine at issue? Is there an issue of fact because you don't know what the -- whether there in fact was an injury? Because if the business really didn't -- if the business and the trust was getting a benefit by writing off a loan that was more than the value of the company, then arguably there wouldn't be a harm. But if

the business was more valuable than its liabilities, then arguably it was harmed.

MR. RAMSEY: I don't disagree, Judge. In your first example, if that's ultimately determined whether it's by the Court or a trier of fact, I think the case is largely over if there was no harm because this was an insolvent corporation. The issue I guess is plaintiffs are saying, hey, we were harmed. So taking plaintiffs at their face value that there was a harm to them, that's why in our view the doctrine's applicable.

From the Eber defendants' perspective, if it's ultimately determined that, look, there was no harm because this company was worthless, that's what we've been saying along. But certainly that's not the position the plaintiffs are taking.

THE COURT: Right, I understand. But it seems to me that maybe there's an issue of fact that's tied into whether or not this Rooker-Feldman doctrine can even apply here.

MR. RAMSEY: Well, I understand what Your Honor is saying. I guess the issue as it were is is plaintiff complaining of this, is plaintiff alleging a harm. To our reading of what they're saying is they're alleging a harm flowing out of what that order precipitated.

THE COURT: Right, but there can be no harm to the beneficiaries of the trust if there was no harm to the trust.

MR. RAMSEY: Agreed.

THE COURT: Okay.

MR. RAMSEY: Agreed.

THE COURT: All right.

MR. RAMSEY: Similar, Judge, and then I'll move on and I know we've got a lot to get through here. The res judicata argument is similar in many ways to the Rooker-Feldman argument. In opposition, plaintiffs say, hey, look, it doesn't apply because of the declaratory judgment exception. The response there is this was more than a declaratory judgment. This order granted, it wasn't just a declaration kind of rubber stamping something, and that's the argument both in response to the Rooker-Feldman and the res judicata is plaintiffs are saying, hey, look, this was a sword or this was a rubber stamp. That's all this was.

There was a lot more to it than that. The order granted the request to accept Wine & Liquor's interest in Metro in satisfaction of the secured debt. It confirmed the validity of underlying debts and the related transactions. This was far more than just a declaration. This was substantively -- there's substantive issues that were reviewed and ultimately essentially blessed by Judge Rosenbaum in that order. So that takes it out of the context of the declaratory judgment exception.

I'm sure plaintiffs' other argument is, hey, look,

we weren't parties there. But as Your Honor mentioned in a different context a moment ago, they're essentially assuming in this case on a derivative basis. And both Wine & Liquor and Metro were parties to that 2012 action. So, since they're essentially standing in the shoes of those corporations here, as a technical matter of law, those parties were present both in 2012 and in this proceeding.

THE COURT: So, there may be, and I think there are, factual issues with respect to the value of the company and whether it was insolvent as all parties seem to agree. But what I hear you saying is that nonetheless, there are certain legal decisions made by the court in Connecticut such as the debt to the company owed to Lester Eber was a valid debt.

MR. RAMSEY: Right.

THE COURT: And that that is not something that this Court can reverse or override under either the Rooker-Feldman doctrine or the res judicata doctrine.

MR. RAMSEY: Correct.

THE COURT: Is that right?

MR. RAMSEY: Correct.

THE COURT: Okay.

MR. RAMSEY: And just to complete the loop, there's other transactions that are intertwined with those loans that were similarly reviewed and approved by --

THE COURT: Right. The key issue though, as I'm

hearing your argument, is whether or not this Court must respect the decision of that court as to the validity of the debts because I don't think there's any dispute that Lester deemed the transaction to be fully in satisfaction of the debt that he perceived that he had.

MR. RAMSEY: Absolutely.

THE COURT: So really the only legal finding that's pertinent relates to the validity of the debt?

MR. RAMSEY: I think that's --

THE COURT: Is that right?

MR. RAMSEY: I think that's accurate, Judge; yes.

THE COURT: Okay.

Okay.

MR. RAMSEY: Briefly, Judge, and I don't need to spend much time on this. It's set forth in our paper. The claims or many of the claims in 6 and 7, Count 6 and 7, we've requested be dismissed as duplication. In opposition, plaintiffs don't even really dispute that. They essentially say, hey, look, the Court may fashion some hypothetical remedy that requires these counts to maintain. They don't say what that hypothetical remedy might be. I think it's clear that the relief they're seeking is contained in other counts and those can be dismissed as duplicative.

Finally, the common law indemnity issue relating to Canandaigua National Bank, plaintiffs for reasons unknown to

us made the independent decision to indemnify Canandaigua National Bank for attorneys fees incurred in this action. The Eber defendants, the Ebers had no say and no involvement in that negotiation. They certainly didn't approve it, didn't bless it. Plaintiffs nonetheless say, hey, look, you should indemnify us for that.

The biggest problem with that argument is one of the few things that the parties agree on in this case is Canandaigua has screwed up allocating or distributing the stock on multiple occasions. Canandaigua intervened or got back in this case, intervened basically saying, hey look, Court, tell me what to do and I'll do it.

Given that the parties agree that Canandaigua has made multiple mistakes in what they were prepared to do as far as allocation of distributions, I don't see how we then make the leap that plaintiffs cut this deal for whatever reason with the plaintiffs to indemnify them. Oh, by the way, Ebers, you had no involvement in it, you didn't bless it, but you should pay Canandaigua's legal fees. That -- it doesn't make sense factually. It doesn't make sense from a legal perspective.

THE COURT: Okay. Now, I have one question though --

MR. RAMSEY: Sure.

THE COURT: -- with respect to the -- I don't know

if this question is -- I think it relates to this, to CANANDAIGUA NATIONAL BANK. But the question is is it your position that the parties are in agreement that plaintiffs have or own two-thirds of EB&C voting shares and Lester owns one-third of the voting shares?

MR. RAMSEY: No is the short answer. I'm going to let Mr. Herbert --

THE COURT: Okay.

MR. RAMSEY: -- delve into that --

THE COURT: Fine.

MR. RAMSEY: -- because it's more nuanced than that.

THE COURT: Fine, okay.

MR. RAMSEY: If we can flip that on --

THE COURT: Sure.

MR. RAMSEY: -- the plate for Mr. Herbert.

THE COURT: Okay. Got it. Okay.

MR. RAMSEY: Thank you.

THE COURT: So, Mr. Brook, why don't you address the matters raised by Mr. Ramsey.

MR. BROOK: Thank you, Your Honor. I was going to plead for that. Given otherwise, it would be quite a long list.

So let's go in order. PBGC, this really is something that it's a sneaky attempt to try to get a factually relevant issue which is that may be reached about insolvency

decided beforehand. And that's why it's their first and foremost issue because they know that if the fact-finder ultimately says that either, you know, what Lester believed at the time or what a reasonable investor would have believed at the time was that Eber Metro would not have been liable after it was transferred to a third part, then it's not insolvent. Because the ERISA liability for controlled group members only applies to the controlled group if the actually -- if the plan sponsor can't put in enough money. And so that's really the question here.

So if Eber Brothers Wine & Liquor which transferred Eber Metro to Lester for the amount of his debt had gotten more consideration that it could have funded the plan, Eber Metro would have never been liable for anything.

THE COURT: Right. So take that more slowly.

MR. BROOK: Sure.

THE COURT: What is the factual issue? How are you stating it?

MR. BROOK: So to the extent that we're deciding whether it was solvent at the time --

THE COURT: Right.

MR. BROOK: -- which I don't think we need to get to, but if we are for purposes of some sort of a damages calculation to the shareholders or what have you, the relevant fact is what was the probable liability and was the

transaction that occurred one that was made in good faith. So, that's two things. One is what was the actual value of the assets and the liabilities. And it's true that when a liability is not -- when it's disputed or when it's not believed that it would continue, you know, you don't charge that to it just because a court many years later found otherwise.

And that's the thing. The Ebers fought tooth and nail for years arguing that there was no liability. So they lost that. But the fact is in 2012, they believed it was not going to be liable. And so if they get a ruling as a matter of law that Eber Metro was liable when that's not what they believed at the time, that would only confuse the issue. So what I would propose is this. If and when we get to a trial on the issue of insolvency or not, they can put in the PBGC court order from Connecticut in 2016 and try to get it admitted as evidence that which would be considered about the liabilities. Or maybe they can make a motion for collateral estoppel, not that that would even arguably apply here but they could try.

But it's not something that is appropriately decided on summary judgment because, A, I don't even know what they're getting judgment on. There's no affirmative defense that asserts this. There's no counterclaim. They just want an early legal ruling that they think will help them I don't know

with what.

THE COURT: Well, you do not dispute -- am I correct that you do not dispute the legal proposition that entities within a control group are jointly and severally liable for ERISA obligations?

MR. BROOK: Correct, Your Honor.

THE COURT: You don't dispute that legal principle.

MR. BROOK: Absolutely not.

THE COURT: What you are saying is is that how that principle is applied in this case for purposes of valuing the company at any time is a fact issue.

MR. BROOK: As is what the parties believed --

THE COURT: Or how the facts -- it's just --

MR. BROOK: Yeah.

THE COURT: It just impacts --

MR. BROOK: Absolutely.

THE COURT: -- how the company is valued is what you're saying.

MR. BROOK: Right, because if Lester believed that by doing the Alexbay, the transfer to Alexbay, he was getting Eber Metro out of the controlled group, then that's really relevant to understanding whether the transaction occurred in good faith because if he believed that this was a way to avoid the PBGC liability, then it would be absolutely incorrect to say that as a matter of law the Court should conclude that it

was liable notwithstanding the parties' actual beliefs in good faith or bad faith at the time of the transaction because valuation is inherently forward-looking. You don't know the future.

And that brings up another prong --

THE COURT: But wouldn't it be beneficial to get the one valuable entity out of the control group? Isn't that something that would be helpful to the trust?

MR. BROOK: If it was done for fair consideration, yes. But when it's done simply to eliminate debt to one of five creditors leaving the company holding nothing but debts with no means to pay it, there's absolutely no way that was beneficial to the trust or to the company, which gets into the issues that I'm sure Mr. Herbert will bring up which is, you know, $3.8 million in debt and we're assuming for purposes of our motion at least that all that debt is legitimate. We have a lot of reasons to challenge it as we point out in our counter statement of material facts, but we're assuming for purposes of our motion that it is all legitimate debt.

But the fact is it was only 3.8 million, and the Ebers own expert says that the assets that were transferred to Eber Metro were worth about five and a half million. So the question really does become, well, was Eber Metro -- were there liabilities attached to it.

You know, and on that point, it's noteworthy that at

his deposition, the Ebers' expert admitted that Lester Eber's affidavit submitted in connection with the Alexbay court proceeding in 2012 provided contradictory -- or I'll maybe use the word inconsistent information versus the legal presumption he was told to make. He was told to presume as a matter of law that Eber Metro was jointly and severally liable for all these debts at the time in question.

And as I think both experts agree, you're not supposed -- I think Mr. Torkio [Ph.] or Torchio [Ph.] described it best, he called it the no-peeking rule. When valuing a company, you're supposed to use the information that's available at the time. And the 2016 PBGC decision was obviously not available at the time. And there has been certainly a dearth of evidence that's been produced on this because, as Your Honor previously ordered, we didn't get any discovery about what the actual, you know, attorney/client communications were about the PBGC liability that were going on at the time.

We have really good reason to believe that quite contrary to what they're asking this Court to rule that at the relevant time, they did not believe that this was a liability that was going to continue after the Metro transfer. And so, if the liability didn't continue with the Metro transfer, then the value that Lester Eber perceived himself as getting was far greater than what they have -- that they would otherwise

want.

And I think that it would really be jumping the gun for this Court to enter any kind of order as a matter of law that would seem to be contrary to actually fact-finding what the value of the company was, what its actual liabilities and assets were worth at the time. And so that's out problem. And it's really exacerbated by the fact that the Ebers themselves argued completely opposite positions with respect to PBGC for many, many years. And I think they actually have really good arguments.

You know, so what happened was -- and I know Your Honor did a lot of labor law so you're probably more familiar with this than me, but PBGC rather than challenging the Metro transaction and the Polebridge Bowman deal which took Eber Connecticut out of the control group by dropping its ownership interest from 85 to 79 percent just below that 80 percent threshold. Rather than saying those were fraudulent transfers, it asked the Court to simply set a retroactive termination date for the plan to one month before the Polebridge Bowman deal so that both Eber Metro and Eber Connecticut were jointly and severally liable for the plan's benefits because at the termination date, that's when you use the control group.

So, the court agreed to disregard those subsequent transactions even though the Ebers pointed out they continued

to fund the plan through 2012. So that's a fairly significant thing. So if we actually had to argue in terms of substance whether they thought that there would ever be entered an order saying that the plan was terminated later, I mean the fact is all contemporaneous evidence we've seen shows that the Ebers believed that it would not be a liability that continued after the transactions that they engaged in. That's why they did it.

And that's why the court in the PBGC lawsuit did something that was fairly extraordinary which is to say that a plan that was still being funded by the plan sponsor had terminated earlier. And I think more than a million dollars in -- in terms of contributions earlier, it's kind of unheard of. And it's really unheard of for a party to say that because a court decided to disregard these transactions that the plaintiffs are challenging, that that means these plaintiffs should lose.

I don't understand the logic behind it. And it's certainly contrary to all logic and reason to say that that court's decision to say that we're going to treat ownership as it was in 2010 should be honored. But plaintiffs can't reset the table to 2010 themselves, which is what we're asking to do. We're asking this Court to say that that ownership table should be set back to where it was in April 2010 including the Polebridge Bowman deal which we have not raised on summary

judgment just to keep things somewhat reasonable here.

But that decision decided to disregard the transaction and that's exactly what we're asking for here. So, if this Court were to say that there was joint and several liability, it would at the same time I think have to adopt the reasoning which is that the subsequent transactions have to be disregarded as well. And at a minimum, we certainly -- if this is going to be an issue that goes to trial, we need to get that discovery that was previously determined by this Court that we didn't have good cause to get. I really don't want me clients to incur more discovery costs to deal with an issue that had been -- and we cited to the point of Your Honor's opinion. It was in dealing with the fiduciary exception where --

THE COURT: Right.

MR. BROOK: -- good cause had been shown.

THE COURT: Right.

MR. BROOK: And the court said that we didn't show good cause --

THE COURT: Right, but still I don't understand why you would need additional discovery because there's exposure to the pension liability. There's a pension and there's a responsibility by the sponsor and entities within the sponsor's control group to fund the pension. And so whatever that -- whatever funding is required is required at any given

point in time. There's a trust and there are 550s filed annually that are publicly available. And the actuary for the fund should know what is owed. So that pension obligation is there regardless.

So, I just -- again, I don't understand what discovery or why what Lester believed or not as to whether he'd get it out is pertinent.

MR. BROOK: Well, I think the parties agree that even if somehow Lester was authorized by the will to do this transaction, he was still subject to an unwavering duty of good faith. And good faith is oftentimes been interpreted by the Court to mean that a fair price was set. So -- and it's a subjective inquiry. So if Lester believed that he was going to get Alexbay to acquire Eber Metro free and clear of this debt, then it would be improper to consider that debt in considering his good faith. That's why we would need it to see what they actually believed at the time because the actual liability was not known.

If this decision that they want to have reached existed at the time of the transfer, there would be absolutely no dispute that it should be considered even though they did appeal it later.

THE COURT: I don't understand why a belief in a disputed debt is relevant to the valuation. It's a disputed debt, period, end of story. Why is Lester's belief as to that

pertinent? Any accountant is going to just say, okay, here's a disputed debt. Why do you need discovery on a state of mind? It's a fact as to what is the disputed debt.

MR. BROOK: Well, we would need it because of every other thing in here, because good faith is not something that is determined by reference to an objective standard of valuation. That's something that's independently required under the entire fairness doctrine or what have you. But whether if Lester believed based on advice of counsel or whatever it is that, you know, they don't want to show us, you know, or even just because he was delusional. But if he believed he was getting a $20 million company in exchange for eliminating $3.8 million debt only and that he was getting it free and clear of debts as they argued for years that he was, then that is absolutely relevant to whether he'd conducted the transaction in bad faith.

THE COURT: But you've already said that the company -- you have information already showing that the company was worth more than the 3.8 million. So what does it matter if it's 20 million more or -- if it's worth more, it's worth more and why does it matter what he believed? At this point, I don't see how that discovery is really necessary.

MR. BROOK: I certainly hope we don't get to it, but I do believe and I can -- if necessary, you know, depending on the -- I don't want to get -- I think we should not get into

it if Your Honor's okay with --

THE COURT: Okay.

MR. BROOK: -- not to get into the discovery issue.

THE COURT: Yeah. No.

MR. BROOK: But it is worth considering that this is an issue that was specifically determined not to be relevant --

THE COURT: Right.

MR. BROOK: -- to our case and then all of a sudden at summary judgment it is.

THE COURT: Yeah.

MR. BROOK: So that definitely caught us off guard. Not that it affects anything because at the end of the day, another reason independent why this Court can't grant them the judgment they want is that the number they're using is actually contrary to the liability numbers that they were using in real time.

Your Honor referenced that there's the actuary that's actually engaged at the time and reports that were given. And what we submitted in opposition to their motion show that there was almost a million dollars difference there in terms of what that liability was represented as being. And their other opinion, this Michael Gallagher guy, it's an undisclosed expert report. They don't even defend that in their reply. And I'm not going to rehash the issues there,

but actuarial testimony is obviously not within the [indiscernible] of the jury. So it's -- and I still have no idea how he calculated this number or what have you.

And even the letter that they relied on giving to their expert was dated December 2018. We didn't get it until after their expert report cited it. So there wasn't even a disclosure of that. We had -- that was an absolute blind-siding to see actuarial issues coming up in their expert report.

Okay. So turning to Rooker and res judicata, this is -- there's a reason why the estate withdrew its arguments in response to a Rule 11 notice of motion that we sent and a brief. And that's because their arguments about what happened in the Alexbay lawsuit are totally misrepresenting the proceedings. There was no injunction as they claim in their reply. That's absurd. I mean and I think that it's -- it can be -- let's look at two things here just so that we're totally clear on the same page. And this is relevant again because the Second Circuit has made clear Rooker-Feldman does not apply if a court is merely putting its stamp of approval or consenting to or approving of something that has occurred outside of court. It hasn't done that even in the context of settlement agreements for a pending lawsuit.

And on that, even Mr. Ramsey said that there were other issues essentially blessed, that's a quote, by Judge

Rosenbaum in that order. And that's exactly where Rooker-Feldman doesn't apply is when a court is merely blessing things that occurred. The order itself was the product of a request in the complaint for declaratory relief.

This is Exhibit 44. And, you know, the wherefore clause in Alexbay's complaint says" "Alexbay, LLC, requests that this Court determine adjudge, and order that Alexbay, LLC's acceptance as a secured creditor of EBW, LLC's ownership interests in Eber Metro which ownership interests serve as collateral securing the obligations of Eber Win & Liquors' obligations to Alexbay, LLC, in full satisfaction of the obligations owed to the LLC is commercially reasonable together with such other and further relief as the Court may deem just and reasonable."

So it's a request that the acceptance is commercially reasonable, not to order the transaction to occur. And in fact, in Paragraph 40 of the Ebers' own statement of material facts, they emphasize the fact that this was a totally voluntary filing, the Alexbay lawsuit. There's no need for judicial foreclosure in the context of a straight foreclosure. It is an agreement that is reached by a debtor and a secured creditor after default. And they went this extra round presumably to be able to make these kinds of arguments down the line, but it's not something that actually hurt us.

The order itself, you know, maybe we would have made some UCC commercially reasonable arguments, too, if not for that, but it wasn't -- it didn't seem to be worth getting into it. I mean it's just not a -- it's not an order that affected us because the fact that it's commercially reasonable under the UCC is in no way, you know, issue preclusive on any of the issues that we're raising.

THE COURT: But what about the fact that the Court according to Mr. Ramsey found that the debts were legitimate debts?

MR. BROOK: I don't see that finding in there anywhere. They argue that in a foreclosure proceeding generally, a court cannot order a foreclosure to occur without determining necessarily the validity of the debts. But, again, this was not a foreclosure proceeding. This was -- even though we've used that term. It was a proceeding to decide that the transfer of assets in a strict foreclosure would be commercially reasonable or is commercially reasonable.

There was no issue and certainly not one that was actually litigated or disputed in any way about whether Lester's debts were valid or not. And in any event, plaintiffs have not moved for summary judgment on their own sake on anything challenging the validity of the debts. I think there's a great deal of reasons to question that, and

it's not something that -- and it's certainly not something that would be subject to issue preclusion because, you know, they haven't even argued that collateral estoppel can apply here.

THE COURT: Wasn't the trust separately represented in that action?

MR. BROOK: No, the trust had no notice of it. The trust was not mentioned in it. Even the parent company, Eber Brothers & Co, Inc., was not in the lawsuit. So, yeah, I know -- the trust had nothing to do with that. It was simply a case where it was a rubberstamping. And I think the Court's order is also grossly mischaracterized by the -- so it says in terms of what's ordered, and this is Exhibit M to Lester's November affidavit.

"Now upon reading the notice of motion dated March 15th, 2012, on behalf of plaintiff in support of the motion together with the affidavit of Lester Eber, sworn to the 14th day of March, 2012, together with exhibits thereto in support of plaintiffs' motion and having no opposition thereto, it is hereby ordered that part of plaintiff's motion seeking a determination that Alexbay's acceptance of collateral in full satisfaction of Eber Brothers' obligation is commercially reasonable under the Uniform Commercial Code is granted. And it is ordered that part of plaintiffs' motion seeking dismissal of defendant Southern Wine & Spirits, Inc., from

this action is granted. Entered May 11th, 2012."

Where's the injunction there? I mean no -- it is just flagrant dishonesty. And it is truly [indiscernible] for them to try to make these arguments to just grossly misrepresent this to preserve an argument that their co-defendant recognized was not reasonable in light of the true claims that are brought here.

If they were right that the judicial order like this or even a prior litigation could foreclose breach of fiduciary duty claims relating to that transaction and to the conduct of the fiduciaries in connection with the litigation, then there would be no such thing as a legal law practice action that could ever be heard by federal courts because, you know, that's what happened there. You know, it was already decided. There's no jurisdiction. You have to reverse it. But, no, that's not what happens. When deciding breach of fiduciary duty like malpractice, the Court to some extent would consider a case within a case.

So to the extent that we're arguing in part if and when we get to a trial that their conduct during in pursuing that case failing to defend it, consenting to it that that was a breach of their fiduciary duty, that does not seek a reversal of that order. We are not appealing that order. It does not need to be changed, and that is why Rooker-Feldman does not even arguably apply here.

If it was a real argument for it, you know, they would have made it long ago before the parties spent tons of money on discovery because this is a threshold jurisdiction issue. It is a fabricated argument born out of total mischaracterization of the proceedings and plaintiffs' claims.

THE COURT: Okay.

MR. BROOK: I'll allow it if you --

THE COURT: I'll -- is there something you wanted to respond to specifically to --

MR. CALIHAN: Just briefly. Mr. Brook suggested that we withdrew it because we recognized on the merits it was not a meritorious argument. We withdrew it because, frankly, I recognize that we could be a free rider here and we didn't have to argue one way or the other, that they would argue it competently. And whatever the argument was, the estate would benefit or not benefit from it.

THE COURT: Okay.

MR. CALIHAN: The estate basically has no resources left.

THE COURT: Okay.

MR. CALIHAN: And the --

THE COURT: Well, you said that in your letter, Mr. Calihan.

MR. CALIHAN: Thank you.

THE COURT: Okay. Mr. Brook, go on.

MR. BROOK: And I told Mr. Calihan for what it's worth that that's not a real withdrawal of an argument, but it's a -- you know, it's a withdrawal nonetheless. He insists that he's been, you know, invoking the safe harbor and the Court should -- you know, not that it should affect anything. I mean these are just frivolous mischaracterizations of Judge Rosenbaum's order.

Turning to Count 7, we did say what relief was requested. I'm sorry, Count 6, they're saying it's duplicative. I mean the fact is, you know, our proposed order includes multiple requests for declaratory relief. The suggestion that we haven't pointed out what declarations we're seeking is just wrong.

As to Count 7, there's no reply to our point on either at oral argument or in the reply brief that Wendy Eber was not a trustee. This a point that they themselves have made. Therefore, her potential liability for a breach of trust only arises through aiding and abetting liability. We could have argued conspiracy, but that just seemed to be unnecessary. So aiding and abetting is the only way to hold her accountable for that conduct in terms of a breach of trust.

You know, it probably was also a breach of her duty as a corporate officer and director, but if this Court doesn't even reach that issue, then this should remain on the table

because that's the only way that she's liable for her conduct. And the record is fairly substantial that she was involved in every one of the -- at least the discussions between Lester and Mr. Gumaer about trust actions that related to this case including the disclosure or nondisclosure of this case of the Alexbay transaction to plaintiffs for several years.

On indemnification, this is one where, you know, I think it's fair to say we did not move for summary judgment on it. I think there are absolutely -- there's just a huge disconnect in what the concept of indemnification is here. And we largely rely on the briefs in terms of the law and what the standard is for that. But what's important here is the fact that we agree that Canandaigua National Bank didn't propose an allocation that was correct doesn't mean that Lester isn't liable for the fact that Canandaigua National Bank has had to enter this proceeding because rather than tell Canandaigua this is the incorrect allocation, here's what it should be, Lester said I want to take all those shares. He told them that they didn't have the stock book when they did.

And that conduct is something that, you know, it's certainly disputed between the parties as to whether or not that amounts to something that justifies equitable indemnification or common law indemnification because even though Eber or CNB undisputedly made wrong allocations in its communications with Lester, he never told them that and in

fact prevented them from carrying out their duty in numerous ways. And that responsibility forced them to enter this litigation and seek a declaratory judgment.

THE COURT: So is it your position that there are material issues of disputed fact that preclude resolution of this indemnification --

MR. BROOK: Yes.

THE COURT: -- claim?

MR. BROOK: Specifically, Lester Eber and his counsel's role in causing CNB to have to intervene. Their argument is essentially that we admit that CNB was wrong in terms of his allocation so there's no claim. That was only part of it, and Lester was certainly to blame for that. That also has very little if anything to do with Lester subsequently invoking this bylaw provision over a year after CNB tried to execute stock powers. It's totally separate things.

THE COURT: Okay. Thank you.

MR. BROOK: I think that's everything that was discussed.

THE COURT: Mr. Ramsey, is there any reply?

MR. RAMSEY: Yeah, briefly, Judge, and then we can move on. On the last point, the bigger issue is plaintiff agreeing to indemnify CNB. This isn't CNB looking for indemnity from us because they got dragged back in. This is

the deal the plaintiff caught to indemnify the bank. That's the problem is they're then trying to pass on their deal to us. That's the issue that we have with that.

With respect to the order, as we [indiscernible] brief, the inquiry here under the tenet of are they complaining about the results of that order, is there a causal relationship between the state court judgment and the injury which the party complains in federal court. And, once again, if we're taking Mr. Brook at face value here, Judge Rosenbaum didn't even read this thing. He just stamped it, said go on your merry way. Certainly, he did more than that.

And there was although we continue to contend that it wasn't necessary to tee it up for Judge Rosenbaum, there was a benefit to doing it in that it was reviewed and we then had a court order out of it. There was also a risk. He could have said, hey look, this doesn't make sense to me. This isn't commercially reasonable. I have an issue with this. I have an issue with Lester's debts. I have an issue with the validity of these loans. He didn't do any of that after reviewing the submission. So this is far more than, hey, rubber stamp, I'm going to so order it which takes it out of the framework of the cases cited by plaintiff.

Real briefly on the PBGC, Your Honor, there's no question as I think Your Honor recognized and said, this debt existed, the pension debt, the pension liability existed long

before the PBGC got involved. That as always there. The exact amount, fair enough. That as a moving target depending on what date we're talking about. The debt always existed. And, ultimately, the PBGC order was retroactive back to 2010.

So Mr. Brook kind of went far afield of what we're looking in our motion. Once again, we're looking at the narrow point. There's joint and several liability. What flows from that, fair enough. There probably are questions of fact in that regard, but that narrow question, was there joint and several liability, it doesn't seem like there's a dispute on that.

THE COURT: Okay.

MR. RAMSEY: Thank you.

THE COURT: Mr. Brook, anything else before we move to Mr. Herbert?

MR. BROOK: I would simply like to clarify the law is not the Rooker-Feldman doctrine only doesn't apply when a court is rubberstamping things. You know, there's no requirement to show that the Court didn't do its job when it approved a settlement agreement or something. The issue is substantively did the Court do something, compel something that requires essentially reversal of that order in order to afford the plaintiffs relief, and there's nothing like that here.

THE COURT: Okay.

All right. Mr. Herbert?

MR. HERBERT: Your Honor, we're here really to try to explain, elucidate some of the corporate and corporate-related issues as they relate to Lester Eber's actions and in particular the arguments that the plaintiffs make about him breaching his fiduciary duty allegedly with respect to the 2012 foreclosure.

THE COURT: Okay.

MR. HERBERT: So what I'm going to cover is, number one, did he have a duty to inform the trust beneficiaries about the foreclosure; number two, what's all this stuff about this "no further inquiry" rule and did that actually apply to this situation; and then, number three, I can talk about the disposition of the Eber Brothers & Co stock here if --

THE COURT: Okay.

MR. HERBERT: -- if ever, shall we say.

THE COURT: Okay.

MR. HERBERT: I think the first issue with respect to the duty -- the alleged duty to inform the beneficiaries about the fiduciary -- about the foreclosure in 2012, I think our position as a matter of law is that there was no such duty, that there's no such duty as a matter of law.

In the plaintiffs' briefs, particularly the most recent one, they claim that this duty existed but they don't cite any authority. They don't cite any New York case

authority supporting any such duty. All I see here in his most recent brief is on Page 3 in a footnote he refers to Restatement of Trusts Third, Section 82 which has a provision in there about generally keeping beneficiaries informed about the status of trust affairs.

The problem with that is that he doesn't cite any New York case authority that actually adopted that provision in Section 82 of the Restatement. And I have to say generally is that plaintiffs' briefs, particularly the last one, have many references and citations to the Restatement of Trusts, but they don't have any -- in most cases, they don't have any cases. They don't cite any cases that actually adopted those sections of the Restatement of Trusts.

So as we know, the Restatement of Trusts and other Restatements are an attempt to sort of homogenize the common law of all states and provide something to the bar that helps resolve various cases. But the Restatement is not New York law unless a case is actually adopted, a particular provision. I think we all know that.

Here, I believe, I will say that it's my understanding from other members of the trust and estates bar is that no one believes that a trustee such as Mr. Eber would have a general duty to inform beneficiaries about the general goings-on with the trust in a New York State trust. Now that's different from other states.

You're probably familiar with the Uniform Probate Code and the Uniform Trust Act. Those are, you know, uniform acts that were, you know, implement some parts of the Restatement of Trusts and other -- and there is in Section 4-213 of the Uniform Trust Act, in Section 7-303 of the Uniform Probate Act a provision that's very similar to this Section 82 of the Restatement of Trusts. But neither of those uniform acts was ever adopted in New York. It's been adopted in many other states but not New York. Now the law in New York is just different than it is in a lot of other states, in many states. It's just, you know -- it just is.

So there's several cases that the plaintiffs have cited to try to make it appear that Mr. Eber had a duty to disclosure the foreclosure to the beneficiaries. One of them is a called Flaum v. Birnbaum which was actually a case in Rochester, New York, which is actually a series of cases. That case does not support any such duty because there the Lester Eber equivalent tried to get the beneficiaries to consent, to actually consent to the transaction that they were complaining about and he didn't do a very good job of informing them about what it was all about. So the court found that the consent was not valid because it was not a well-informed on. He didn't have to get their consent, but he just chose that as a way to actually try to escape the "no further inquiry" rule.

The other case is a case called In the Matter of Scarborough. That case was cited as support for this duty to inform. Not so. That case involved an attempt by a fiduciary to get the surrogates court to approve a particular transaction that they were complaining about. And there again, the court said, sorry, you didn't tell the surrogates court enough about what was going on so that avenue didn't work either. But we're not doing either one of those things, so those two cases really don't have anything to do with what we're talking about in this case.

They cite to another case called Matter of Wood. But that doesn't have any -- that case, I'm not even going to get into the case, but really doesn't have anything to do with the facts and circumstances of this case. It's about a different issue.

All right. So let's talk about the "no further inquiry" rule then unless you have questions about that.

THE COURT: No, thank you.

MR. HERBERT: Okay. So what's this "no further inquiry" rule? This is as a general matter, right, a trustee of the trust is supposed to show -- abide by a duty of loyalty to the beneficiaries, right? And if there's a challenge transaction which in most cases involve self-dealing between the trustee and the trust, then the duty of -- the "no further inquiry" rule just says that there's a presumption, a weighty

presumption that that transaction would be voidable by the beneficiaries unless you could fit yourself into one of at least three different exceptions.

One is [indiscernible] transaction, but we got the consent of the beneficiaries, okay. We're not arguing that even though the beneficiaries were well aware that the loans had been made, they were given an opportunity to participate in them, they received the documentation. We're not arguing that that was a valid consent. Number two exception is go to the surrogates court and get them to approve it which that was not done here.

The third and most important exception to the "no further inquiry" rule is was the -- were Lester Eber's loans in the foreclosure, were they authorized by the will in the first place, the 1969 will. And we would contend that absolutely, they were. Now, I think Mr. Brook has conceded in his papers that the "no further inquiry" rule is relaxed if there is such an authorization either by the express terms of the will or by what they call "necessary implication," okay. And this is all on the strength of a number of cases. The most famous one is the O'Hare case which we cited in the papers. And I think both parties have cited that case.

So, he's -- Mr. Brook has conceded that the making of the loans and the securing of the loans were authorized by the will, so that's not an issue. So there isn't any

voidability issue with respect to the making of the loans or the securing of the loans.

THE COURT: Is there any dispute as to the amount of the loans?

MR. HERBERT: I don't know if there is, but -- I don't know really if there is.

THE COURT: Okay.

MR. HERBERT: Do you think there is; do you know?

MR. RAMSEY: Not much would be the answer. There's two sets of loans. There's the 2009 line of credit with Eber Metro. We see the bank transactions that have occurred. They're supposedly earlier loans. There is no substantiation for those having been made. I have not seen --

THE COURT: Okay.

MR. RAMSEY: I've asked about it, but I have not seen any bank records showing deposits made and my client has guesses as to what it might be. But even the earlier loan agreements that were supposedly being amended have not been produced. So we certainly dispute that, and if we go -- and if we actually went to a trial, we would put them to their proof to show that those loans were real especially because in the 2010 letter to the trust beneficiaries, Lester did not mention any earlier loans.

THE COURT: Okay.

MR. HERBERT: All right. So let's stop here. They

could see that the loans and the security and the loans were authorized, therefore, that those are not voidable.

THE COURT: Yeah.

MR. HERBERT: Okay? So let's take that apart for a minute. What does that mean? So if you enter into a loan agreement that's secured, what do you have? You've got a loan agreement, you've got a security agreement, and a note, okay. The average package of documents which this was, these are just average plain loan documents, they provide for the making of the loan, the granting of the security interest, and then there's a massive number of pages about what happens if you don't pay the creditor back.

The agreement as to what the creditor's rights are in the case of a default are all spelled out in black and white in the security agreement and they always are. And in this case, in all cases, the parties agreed that Lester Eber would have the right to foreclose in accordance with the Uniform Commercial Code just as he did. So, again, I mean are we serious here? Their point of view is that somehow the enforcement of the security interest wasn't authorized by the will and it wasn't a necessary implication of what was expressly authorized.

I mean are we serious about that? You know, are you saying that, well, you know, we had 50 pages of documents here and the only ones that are authorized were the, you know, the

even-numbered pages and the odd-numbered pages, no, no, that's not authorized. Well, you know, what reasonable lender would enter into a transaction like that if they didn't believe that their loan agreement and security agreement was enforceable in whole?

THE COURT: So if the court finds that you're correct and that the will did authorize the loans and that the securing of the loans, then to what and how does that help to resolve the remaining issues in the case because there are certain -- there's still a dispute as to the value of the company, right?

MR. HERBERT: Well, if the making of the loan, the securing the loan, and the enforcement of the loan, meaning the foreclosure, are all authorized expressly or by implication, then that relaxes the Lester Eber's fiduciary duty of utmost -- duty of utmost loyalty to the beneficiaries to -- you know, it changes it from being a voidability issue to just being good faith test.

So what we're arguing is that because the enforcement mechanism in the security package was implied, impliedly authorized by the will, that therefore the entire foreclosure and the performance of the security agreement, that that should just be tested by a good faith standard. And I think that -- and I'm going to return to that in one second.

THE COURT: Okay.

MR. HERBERT: So, now Mr. Brook also goes on to say that -- he says -- well, he probably would conceive that if Lester Eber had foreclosed on the loans and had a public auction of the collateral and the collateral had been bought by some independent third party, that that would have been okay. But, you know, he's not going to object to that, I believe. But --

MR. BROOK: [Indiscernible].

MR. HERBERT: Well, okay. But what's the difference between the foreclosure that he did and a foreclosure where there was a public sale to a third party? Well, the main difference would be, well, on the foreclosure that was done, we're not sure that the value that was ascribed to the Eber Metro stock was high enough. That's really what it boils down to. That's what he's arguing, okay.

But I would say that if that's the case, then you've got a situation where here's a trust that has -- where the powers and duties section has not duty to retain the assets. There's nothing in the will that says the trustees had to retain the stock of the company. It expressly says that. It's also the case that the assets of the trust are not what we call unique assets. They're what's called commercial assets. So unlike the case with the Estate of Rothko where we had a large group of paintings at issue, this is just stock in a company in a case that I think we both cited called Atlas MF

v. MacQuarie. They made very clear that there's a big distinction between the two and that stock of a company is just a commercial asset where, you know, the disposition of it rightly or wrongly can be compensated for with damages.

So, if you have a case where there is no duty to retain the assets, non-unique assets, and the really fiduciary issue is was the right price attached, right. Then I think you'd go right to the case of Estate of Rothko, right, where it says there specifically in that scenario that you can't get rescission or restitution or reconveyance of the collateral as a remedy. You cannot. There have to be other -- there has to be other considerations involved. But it specifically says that in the Court of Appeals case in the Estate of Rothko.

And I would also point out that there's a lot of speculation about what the will might have meant or could have meant and, you know, who said what and what did Alan Eber think. Well, it's not a matter for us to decide what he should have thought. It's a matter of what he did think, right. He never -- none of these musings about distinctions between public sales and private sales, none of that is in the will. He didn't say anything about that. He just says that any of the trustees, whether it be Lester, whether it be Canandaigua Bank or anybody else, are authorized to make loans to the companies and to secure them and by implication to collect them and to enforce their security interest.

So, that's why we would say that if there's an issue here with respect to the duty of loyalty, it's just a good faith issue.

THE COURT: Okay.

MR. HERBERT: One thing I forgot to mention was Mr. Brook cites a case Boston Safe Deposit and Trust Company which I'm not sure why it was cited, but -- which is a Massachusetts case and it stands for the proposition that even in a situation where there is self-dealing by a trustee, right, that a greater degree of latitude might be afforded a trustee as far as what might be applied with respect to their conduct depending on what alternatives the trustee had.

Did he have any other alternatives to what he did? We would submit here that he didn't have any alternatives. This company was, I think as we've all demonstrated, was out of business, it had massive debts, many third -- very substantial third-party creditors who were ready to come at him regardless of what he did about the foreclosure.

Now, why did he secure the loan in 2011? That question was raised. Well, I think that was there, but I think he secured it because he was trying to protect himself from the other creditors because he knew the Teamster's union was coming at him. He knew the PBGC was going to be coming at him and other people as well. He didn't need to secure the loans to affect the plaintiffs because he's a creditor.

They're indirect equity holders. He's always ahead of them, sp he could have been an unsecured creditor and been in the same posture vis-a-vis the beneficiaries as he was as a secured creditor. So instead of proceeding under the UCC if he was unsecured, he could have sued to collect his debt, gotten a judgment lien, he'd be in exactly the same place he was in 2012.

I would -- you know, following on just a little bit more on this. If we get to the point where Lester's duty was just a duty to act in good faith, then, you know, I wonder again why are we here. The plaintiffs have conceded that the loan and the security of the loan were authorized by the will and hopefully they'll see the light and concede that the enforcement loan was authorized by the will. They've admitted that Lester complied with all the requirements of the UCC in foreclosing of the loan. One of those requirements was to act in good faith under the UCC. That's an express requirement under the UCC.

And in doing that, he says right here on Page 4 that "plaintiffs do not assert any claims based on violations of the UCC." And then he said -- he describes good faith and he actually mis-describes what good faith is under the UCC. He says it's just the low hurdle of honesty in fact. Well, no, it's not. It says -- the definition's right in the UCC.

THE COURT: Yeah, but the plaintiffs wouldn't have a

cause under the UCC in any event.

MR. HERBERT: They shouldn't.

THE COURT: So why is that --

MR. HERBERT: Well, but I'm saying is that they're acknowledging that Lester met his burden of good faith under the UCC.

THE COURT: Well, in order to get the court approval of the transfer. I think they're acknowledging that the Court approved the transfer. They're not disputing that. What I understand them to be saying is that there was either a violation of his duty of good faith or a higher duty by ascribing a different value to the asset than was really its true value and that he could have gotten -- he could have I guess gotten his debt repaid without securing the transfer of that asset.

MR. HERBERT: Right. The UCC, by the way, doesn't even require an equivalence of value between the loan and the security. You could be off by as much as 25 percent and the case law would say that that's fine and dandy.

I'm just saying that all these determinations of good faith plaintiffs are conceding it under the UCC. Judge Rosenbaum effectively ruled that as well. And it's the only issue from a fiduciary point of view is whether or not he acted in good faith and not -- you know, for their inquiry rule. I wonder why we're even here to be honest with you.

Anyway, all right, so let's talk about -- for a minute about the fabled stock of Eber Brothers and Co. So you had asked earlier whether or not we were in agreement on the numbers of shares. As a hypothetical matter, sure. I mean I don't think -- when they originally allocated and then reallocated, it wasn't right. I'd heard Mr. Brook try to blame Mr. Eber for that. That's nonsense. I mean we're the ones that raised it with Canandaigua that the numbers were wrong. I was the one that raised it with Canandaigua that the numbers were wrong. If you want to know the truth of the matter, it wasn't them and it's only very recently that they acknowledge that they had done it wrong. But that's neither here nor there.

So, the plaintiffs are conceding that Canandaigua's attempts to transfer the stock to the beneficiaries in 2017 were ineffective. So that's just wipe the board off on that.

Now in the process of trying to make the transfer, I guess they gave Lester Eber notice of their proposed transfer and when he got it, the only thing that ever -- we ever saw that looked like a notice from CNB we immediately exercised the call right. I know that because I was the one that was, you know, doing it. So, I don't know what to say about the -- even though that attempt to transfer the stock might be void, the call right that was -- I think we feel was validly exercised in 2018, we think it was but what can I say.

Mr. Brook has in his third brief, let's see, these are just some random points. He has a paragraph in which he says that as for the stock certificate deficiencies, the Ebers conveniently ignore the first sentence on the face of the stock certificate that says in part "transferable on the books of the corporation by the holder hereof in person or by dually authorized attorney upon surrender of the certificate properly endorsed." That says period. I have no idea what he's talking about.

That sentence as it appears on the stock certificate, that's just boilerplate and what that means, that means that if there was a transfer, an actual transfer from A to B by delivery of the certificates and B -- and A endorsed certificate over B, then B physically surrendered the certificate to the issuer, then the issuer would register the transfer on their books. You know, where it says "transferable on the books," it really means the transfer is registerable on the books of the corporation. But that has absolutely nothing to do with anything. It has nothing to do with anything. There has never been a transfer.

I would be -- I would, you know, certainly acknowledge that -- and I think I said this a year ago when we were here that had there been a valid transfer between Canandaigua as trustee and the beneficiaries, had they done it right and they presented the certificate to the company, the

company would have had to register the transfer but that never happened and it had nothing to do with the company.

The plaintiffs then go on and try to make an argument about some sort of equitable transfer of the shares that was accomplished by the finalization of the order terminating the trust in June of 2017. I have to tell you that [indiscernible] I never heard of equitable transfer of stock. I don't know where you're getting that from. He doesn't cite any New York authority as to what an equitable transfer is. What's that?

And he cites the Restatement of Trusts Section 345 which doesn't have anything to do with the facts of this case. It has to do with another issue that's not even the issue here but in connection with a trust that has a single beneficiary. I should have kept reading because there's another Section 347 that has to do with the termination of a trust with multiple beneficiaries like this one where the law is totally different than what was 345. But neither one of them have anything to do with what we're talking about here.

I think importantly here you have to look at this, what rules apply here to a transfer of stock, okay. I think that Article 8 of the UCC on securities, okay, that was written to provide clear, concise, simple, and predictable answers to issues relating to the transfer of securities. And as you can imagine, that's quite important when there's

millions of transfers going on every five minutes in the world. Nobody ever said that you could layer on top of that some notion of an equitable transfer and that that would preempt what was in Article 8 of the UCC.

Now I think we've cited and Mr. Brook cites for other purposes Section 1-103 of the UCC about the governing law, the application of other governing law to the UCC where it says that the UCC is the prime source of commercial law rules in the areas that it covers and that principles of common law and equity can supplement the UCC but they cannot supplant them. And what he's suggesting here is supplanting the UCC rules on what constitutes a transfer of stock and what the consequences are and who's got what responsibility when with a whole another concept which he doesn't cite any New York authority for.

The next point on this is there's an issue here about whether or not the transfer restriction was binding on the trust in 2012. And I think we have and the record shows that this -- the bylaw that contained the transfer restriction was adopted by the trust in 1996. That's a long time before 2012. It was adopted with at least two of the three trustees. Now Canandaigua wasn't a trustee in those days. Another bank was, M&T Bank. They came into the picture about ten years later. And, you know, Canandaigua, they've got to take the facts as they are when they come on board.

But the stock certificate, as we've noted, it specifically notes on the face of it, it makes reference to the transfer restriction, right. The trust is bound by the transfer restriction if either they have actual knowledge of it or if the stock certificate -- if the transfer restriction is noted conspicuously on the certificate, right, and that the stock certificate right on the front -- and there's not -- there's a lot of white space on the front of that stock certificate -- says that the holder takes the securities subject to the terms of the charter and bylaws of the company and all amendments thereto. Well, why do we think that's there? It's for exactly this kind of thing. You're supposed to read that and say, oh, I better go look at the charter and bylaws and see what's there before I go dealing with the stock.

So we would argue that Canandaigua, they had the certificates. You know, we didn't have them. They had them. They obviously didn't look at them. But they should have looked at them and they shouldn't have gone off -- they should not have gone off and tried to deal in the stock without satisfying themselves that they knew what they were doing. So, you know, they know -- their trust department, I mean this seemed to be an issue here, their trust department knows perfectly well that transfer restrictions on the stock of small privately-owned family companies is rampant. It's all

over the place. I've been in this business for 40 years working for private companies. That's what we do, transfer restrictions are us, basically.

The plaintiffs' brief also raises the question as to whether we were obligated to give the surrogates court notice of this transfer restriction. I have no idea where that's coming from. There's no authority to that effect. You'll recall the record shows that Canandaigua was the driving force behind the filing of the petition for the termination of the trust. Lester Eber had nothing to do with it. The petition even says he had nothing to do with it. You know, I'm sure that the surrogate didn't look at that, but, you know, I'm sure -- but he could have and maybe he should have. But Canandaigua, surrogate, they both had the stock certificate and both had the restriction right on the front.

Anyway, that's --

THE COURT: Okay.

MR. HERBERT: -- the high points.

THE COURT: All right. Thank you very much, Mr. Herbert.

Mr. Brook, I'll hear from you.

MR. BROOK: I want to note at the outset that I realized while I was sitting there that I forgot to address the consulting agreement and would ask for a chance to possibly circle back to that at the end. There's a lot of

moving parts here, but I'm going to focus as this is what we were just talking about on largely the Alexbay transaction and my client's right to the shares.

And I think that the overwhelming theme here is Lester doesn't have to obey the rules. And it's brought into just stark relief by the fact that Mr. Herbert argues that Canandaigua had a duty to inquire about whether there was a transfer restriction but that Lester Eber, a co-trustee who entered an appearance in the action, had a -- and undisputedly had the right to prevent termination of the trust if he just said so and had a duty to state any objections that he might have had as either a trustee or a beneficiary, that he had the right to just remain silent at the same time when he supposedly knew of this transfer restriction.

And it's telling there's no reference at all in either the reply brief or anywhere to the fact that res judicata is binding upon accounting proceedings not only to the parties who participate like Lester Eber but to plaintiffs too. And we knew about the proposed transfer and that's why we didn't object to it. If we had had any inkling that there was a possibility that the transfer once it was ordered by the Court or the distribution of assets once ordered by the Court might be intercepted by Lester, we would have opposed. We would have absolutely opposed. We were shocked when Lester didn't oppose. But who are we to look a gift horse in the

mouth?

So that's also why estoppel applies, another issue that they do not address, the fact that Lester Eber's silence on this issue which he apparently had no knowledge of induced not only plaintiffs but the Court to take actions that would not have occurred otherwise and for them to try to now claim, oh, we didn't get notice of any intended transfer until October 2018 when they acknowledge, and it's undisputed that the surrogates court ordered the distribution in June 2017. That's just ridiculous.

I mean it's possible that they overlooked something, they forgot something. There's undisputedly a five-day time limit also on the bylaws even if they could apply. And Lester Eber's lawyer, like plaintiffs' lawyer, me, got the same letter from Canandaigua's lawyer in October 2017. They say that's not the same because the stock powers sent to Lester's lawyer were only the stock powers issued for Lester's shares, the one-third share, roughly one-third shares. And he didn't cede the stock powers to plaintiffs. Well, come on, really?

He sees he's only getting a third of the shares, the letter is sent to me, says we're making the distributions. He doesn't have notice that there's a distribution being proposed to the other two. So the whole notion behind this is just more falsehoods, just outright lies to try to get a result that is inconsistent with the trial -- with the surrogates

court's order. And so the fact that it's undisputed what the surrogate court ordered and the distribution there should be the end of the story.

And, you know, I can get into the rest of it but, you know, Mr. Herbert, I'll just say the reason why I wrote "period" after the sentence dealing with transferability is because there is a period on the stock certificate. That's the sentence that talks about transferability. There is no reference to a restriction on transfer, and that does distinguish these certificates from those that other courts have said are sufficient. A generic reference to the bylaws and it being subject to those, how does that indicate there's a restriction on transferability when the first word is "transferable?" It surely doesn't.

So, even if this stuff could have worked, the fact is these stock certificates, they aren't good enough anyway. So there's a host of reasons why that is wrong, but it really does play into what is ultimately the main impetus for summary judgment here and why it should be granted and why this Court should not -- you know, I suppose I should say this. If the Court does believe that there's going to be -- has to be a trial on the Alexbay transaction, we do respectfully implore the Court to possibly even take issues out of order to try to get that on Judge Kaplan's schedule as soon as possible given the ticking clock to try to get John Slocum back into

business.

But we don't have to get there because despite, you know, some very snarky commentary from my adversary, it's very clear that the "no further inquiry" rule is something that is implicated here because of the rule of construction imposed by New York courts and is recognized by the Second Circuit most strongly in Rens v. Beaman [Ph.] that any language permitting self-dealing must be strictly construed.

And here's how -- you know, when reversing a trial court in terms of its interpretation of something in the Rens case, the court said: "We do not agree, however, that the exculpatory clauses below justified a lowering of the standard of the trustee's obligation. Only the most explicit language can protect a fiduciary from liability and a conflict of interest with his [indiscernible]. Courts may not read exculpatory language broadly, lest they unwittingly permit erosion of the fiduciary duty itself." And there's some citations in there. That's on Page 745.

That's important here because this will unequivocally make clear that although there was no duty to retain the business, the duty of undivided loyalty was not excluded from decisions about whether to retain or get rid of the business, and that's clear because the testator, Alan Eber, said there will only be the standard of good faith rather than undivided loyalty when it comes to decisions to

retain the business. So he knew how to exculpate decisions to retain and he only made it for decisions to retain.

So by necessary implication and consistent with standard trust law, any decision that would result in disposing of the business is still subject to the duty of undivided loyalty that precludes a trustee from acquiring any trust asset. And that's ultimately why, you know, there's no -- there wasn't even an artifice of a public auction here.

THE COURT: Isn't -- if there needs to be good faith to retain, isn't that the same thing as saying good faith to dispose?

MR. BROOK: Well, certainly good faith is always there. That's non-waiveable. So saying that they're just held to the lower standard when they make a decision to retain it, basically saying as long as you act in good faith if you decide to keep the company and it goes belly up and secured assets are lost or whatever, there's no liability as long as you acted in good faith. So that is actually the opposite of saying that you can dispose of the property with only good faith because, you know, just pulling back, the primary wish expressed in the will in that same paragraph that conveys the exculpation for good faith retention says it's my primary wish that the company be retained by the trust. And subject to that primary wish, it is my hope that Lester may have an opportunity to participate in the management thereof.

So, stepping back further, more context, the very first thing when establishing the residuary trust was saying that upon termination which would occur when all three children have deceased, Lester being the last of them, the assets including the Eber Brothers' stock would be distributed one-third, one-third, one-third [indiscernible]. And so there was no possibility that the trust -- you know, under the explicit terms as long as the trust held the business and Lester Eber was alive, there was never a possibility that he could personally change that ownership balance. The ownership balance was he had to act for the trust.

He only had a one-third interest. He was not allowed to try to get a higher ownership interest under the terms of this trust. There has to be explicit language saying that he can do that. And even in cases where there have been such explicit language, you know, it's really explicit like the O'Hare case I think is a great example of what explicit exculpatory language permitting profiting and self-dealing looks like. And --

THE COURT: Well, you're not saying that Lester engaged in self-dealing by loaning the company money, are you?

MR. BROOK: No, we're not. I think that we have argued in opposition to their summary judgment motion, but it's not part of our motion, to be clear, that because there were three trustees, Lester could not unilaterally make these

loans and set the terms himself. That it's -- you know, when there are multiple --

THE COURT: But isn't there evidence that Lester provided notice that he was making the loans and an opportunity to his siblings to also make a loan? Isn't that -- aren't those undisputed facts here?

MR. BROOK: He gave notice of one loan. He did not give notice of any of the earlier loans, first off, and those other loans were necessary for him to get to where he was going. And in any event, I don't think there's any argument that that is legally significant. They have said that they don't argue that that constituted consent to the later transactions. Now, you could say that that was notice that there was a loan being made. You know, I think then you get into all sorts of questions --

THE COURT: What is Lester had never made these loans in the first place? What would have happened?

MR. BROOK: Well --

THE COURT: The business would have gone belly up. And then everybody would be in a worse position. You wouldn't even be here arguing this.

MR. BROOK: It's true and maybe. I mean it's true that's a possibility, let me say. We don't know because those are hypotheticals. I mean certainly if we talk about the consulting agreement, if Lester had given that to the company

as a revenue stream and then continued to be paid his $300,000 a year salary he was getting for doing the same work but now for, you know, Southern, then in that case the company would have gotten $3 million revenue stream, it would have continued paying his salary in a reasonable amount. Rather than him getting that whole windfall, there would have been no need for loans.

THE COURT: The time that Lester got the consulting agreement, was the company paying a salary to anyone?

MR. BROOK: Yes. It was paying --

THE COURT: Who was it paying a salary to?

MR. BROOK: To Lester Eber, to Wendy Eber. As we point out in our counter statement of material facts that attach -- the books and records of the company show that they were continuing to pay payroll to people well into 2008. That's Eber Wine & Liquor. And, again, in 2010, Lester Eber's salary was paid entirely by Eber Brothers Wine & Liquor, not a subsidiary. That's how it was reported to the IRS on a W-2.

So there was unquestionably a false statement of fact in their affidavit when they tried to say that this company had no employees and had no further operations because their wine process lasted a long time afterwards.

THE COURT: But it was completely wound down by 2012, is that correct?

MR. BROOK: In terms of its own operations, yes, I

think it was --

THE COURT: There was no -- there were no salaries being paid at that point.

MR. BROOK: That's true by that entity. However, I'll make the point --

THE COURT: And the consulting agreement occurred after that, right?

MR. BROOK: No, it was 2007.

THE COURT: Remind me of the date, 2007?

MR. BROOK: It was first -- the first documentation we have showing the consulting agreement is a February 2007 --

THE COURT: Okay.

MR. BROOK: -- letter that includes it among the rest of the Southern transaction --

THE COURT: Right, okay.

MR. BROOK: -- there. And so -- and I do just want --

THE COURT: So you're saying that because they were paying, because the company was paying Lester and Wendy after 2007, that it was -- that the wind down process meant that it was still ongoing and should have somehow received money that Lester was receiving from Southern --

MR. BROOK: Yes, Your Honor. And --

THE COURT: -- in the consulting regarding New York?

MR. BROOK: Yes. And it's because what was he

consulting about? He was consulting about the New York wine and liquor business. This was, as we point out, a classic instance of what the literature calls a transaction bonus or a merger bonus for management. And in the standard situation, these are approved by the board and they are approved by the shareholders when they consent to the merger. And there's a lot of articles --

THE COURT: But they're -- okay.

MR. BROOK: Sorry.

THE COURT: But they're --

MR. BROOK: But this was not.

THE COURT: Right. Okay. The consulting agreement wasn't, but there was no --

MR. BROOK: The consulting agreement --

THE COURT: -- liquor being sold and no stores operating --

MR. BROOK: Well, they never had stores.

THE COURT: -- at the time that the Southern transaction --

MR. BROOK: Now when it was -- Eber Brothers was still in full swing in February 2007 when we see the consulting agreement in writing in a document, notably a document that the Ebers themselves withheld in discovery and we only got because we subpoenaed Southern. So that document, you know -- and Lester in his opposition affidavit had said

that, you know, that these transactions were not negotiated at the same time. But that document absolutely shows otherwise. I mean it's Item 6 in this transaction.

The amount of the consulting agreement later went up, and there ended up not being as many restrictive covenants. And those are issues that, you know, we could potentially deal with when coming up with -- if we had to get into the weeds of, you know, what this was going on. But the point is Lester's loans -- you know, the early ones certainly, you know, disputed. There's no evidence that these were actually made. And there's evidence that they weren't.

As far as the later loans, those were only needed because the company didn't get the revenue that Lester was getting and the company needed it. Lester got almost $900,000 a year at a time when the company was supposedly dying and for doing substantially the same work as he was doing before only both for, you know, Eber Brothers as it was winding down, starting to take over Eber Connecticut, and then also working for Southern Wine & Spirits on the side.

THE COURT: So you're saying there's an issue of material fact regarding what Lester was doing under the consulting agreement?

MR. BROOK: I don't think so because I think it's -- you know, what he says and what Southern says is undisputed. And it's possible that they are -- I don't -- I'm trying to

think about it.

THE COURT: Well, what I hear from defendants is that there is an issue of fact. I think Mr. Ramsey said that what Lester was doing under the consulting agreement had nothing to do with the business that the Eber entities engaged in in New York.

MR. BROOK: I think this is more fairly claimed to be a characterization of the undisputed facts. It's undisputed that Lester advised, you know, Eber or Southern Wine & Spirits on New York, how to navigate their legislature.

THE COURT: Well, isn't a characterization of facts mean that there's a dispute as to what they mean?

MR. BROOK: I don't think so, not in this instance. I think to be perfectly frank, this is the closest call in terms of a fact issue because most cases say that whether something's a corporate opportunity is something that has to be decided by the trier of fact.

Our argument is that here because, you know, of what the Southern witness has said and because of the fact that this was something that was built into the broader transaction, I mean that's a fact that really does distinguish this from other corporate opportunities because we have the evidence beyond dispute that this was something that was negotiated with Lester because of his position and as part of something that was supposed to be benefitting the company but

a carveout of his own special bonus, as it were. And he did not get that approved by either the board even though the board approved every other transaction with Southern, and he did not get it approved by the trustees. So --

THE COURT: Okay.

MR. BROOK: -- on that one, but coming back to the other point, it is that playing the hypothetical game about what would have happened to the company is hard because the other thing about the reason why the "no further inquiry" rule applies in the sense of corporate context too as the case law says including O'Hare which actually despites broad exculpatory language found a diversion of a corporate opportunity by that trustee who had total exculpation.

It's because of the fact that the -- you know, the trust beneficiaries really are in a position unlike anything like a shareholder. Shareholders get a vote. They have the ability to appoint directors. A trust beneficiary, as Mr. Herbert rightly acknowledges, the disclosure obligations they are relatively limited. And to touch on that briefly, the disclosure issue here is not other than the in the fraudulent conveyance -- or not fraudulent -- fraudulent transfer -- I'm totally misspeaking -- fraudulent concealment count, the failure of disclosure not the basis for liability. It's doing these transactions.

THE COURT: Right. I understand what you're saying.

THE COURT: And I think that, you know, so bringing it back, their defense, I'm not sure whether they really are arguing still that the UCC compliance with that is all that's necessary that it abrogates fiduciary duty. It's an incredible proposition, and it is one that is inconsistent with a number of cases that they themselves have cited, one of which I have a copy for the Court in case you don't have it. Speaking with counsel beforehand, they apparently thought that they filed certain unpublished decisions, but they did not.

One is called Genger v. Genger. They misrepresent that base as involving, you know, a trustee -- they cite it for the proposition that even when a trustee engages in a breach that there won't be a reconveyance to the trust beneficiaries. The problem is the defendant wasn't the trustee. There was a trust involved in some sense, but he was not the trustee. And I believe if the Court looks at Pages I want to say 10 and 14, both parts make that abundantly clear.

But that case is also great because it shows that in the kind of situation like we have here that summary judgment can be appropriate, even in that case where it was involving -- because it didn't involve a trust, it wasn't a "no further inquiry" case, that there are circumstances where the transaction can be -- in that case, the court said that there was a basis to set aside the transaction, but it refused to do so because the parties had so much acrimony.

And in that case, as the opinion makes clear, the operating subsidiary at issue had already been sold off to the Trump Group for $44 million, so there was a basis to award damages and to believe it could be paid. There is nothing in the record that suggests that Lester Eber, Wendy Eber, even with the Gumaer estate contributing that somehow money damages could ever be awarded to satisfy this, not to mention the fact that everyone seems to concede that valuing a private company like Eber Connecticut and by extension its parents is inherently uncertain.

And Lester in his deposition said that at the time of the transfer he thought it was questionable as to whether it could meet its debts. That's an interesting admission because it means that there was no -- he certainly did not assert a belief that it was insolvent and it wouldn't make any sense for him to because if you're -- and that brings us to --

THE COURT: Well, if somebody's saying they're not certain the company can meet its debts, isn't that a statement that there's a concern about insolvency?

MR. BROOK: Sure, a concern. And a concern is not the same thing as actually saying I think it's insolvent which is what they're asserting on summary judgment. So that's not something that we rely on per se for that. But ultimately, one of the most important things for this Court to be clear on and it's something that I'm not sure how often it comes into

this Court, but it's understanding what it means to actually have rights as a secured creditor under the UCC Article 9. There is no right for the creditor to acquire the company. Putting aside Lester's fiduciary duties, even as a secured creditor without any fiduciary duties, UCC Section 610 specifics the rights and remedies.

Mr. Herbert referred to the fact that there's a laundry list of detail in these security agreements that says what might happen if default. Not one of those says the secured credit may acquire ownership of the collateral directly. Now, the possibilities of foreclosure are to conduct a sale in a commercially reasonable manner. And it is there that sort of the fact and the interplay between trust law and the UCC I think becomes clear because the actual right is to conduct a public auction. There is no right to purchase property in a private sale by the secured creditor himself. He could do it with a third party. There is no right for a private sale unless it is something that has an objectively determinable value. By reference like say it's stock that's traded on a market, then, yeah, you can say what the value is. In those circumstances, then a private sale is allowed but otherwise, it must be at a private -- or at a public auction.

And trust law is undisputedly of the view that a public auction even then a trustee cannot bid on trust assets. So the actual rights of foreclosure that Lester had under the

UCC did not give him a right to acquire title to a trust asset, certainly not by necessary implication. And that's the thing is they're arguing necessary implication, that in order -- by making a secured loan, Lester necessarily had the right to foreclosure.

And I think that as the Dabney case, Judge Learned Hand that we cite in the opinion points out there's a lot of questions I think about whether that is true that the right -- that foreclosure allows a secured creditor to sort of take off their creditor hat. I don't think that's correct. But to be clear, I agree with Judge Learned Hand. I'm not disagreeing with him.

But in terms of the auction itself, so he can't bid on it. So instead, they do this strict foreclosure which is something -- and this is where if the Court doesn't already have it, there's a case that they cite called Gunnerman. There's a transcript from Delaware. If the Court would like a copy, I can provide that of the transcript. It was an oral argument. It was quite a bit of effort to try to track this down, but, you know, it turned out I knew the lawyer and I mention this --

THE COURT: Why don't you hand up a copy of that if you have it?

MR. BROOK: Yes. Yes, Your Honor.

THE COURT: I just want to make sure.

[Pause in proceedings.]

MR. BROOK: While I'm at it, I'll provide a copy of the Genger decision since that wasn't on Westlaw. So in Gunnerman, it was actually -- so they cited that for the proposition that a shareholder vote is not required under the relevant statute for a transfer because, you know, it's just an enforcement of rights. But I think what's clear and I've tabbed this, I've given a copy to opposing counsel showing the tabs and the highlight, is that the court, in this case Vice Chancellor I believe it was Strine was under the impression that he was -- that there it involved a strict foreclosure, but he thought that the creditor was exercising rights under the pledge that were within the four corners or arguably a lesser included option.

And that's just not true because the thing about a strict foreclosure is the law says it cannot be agreed to before default. So loan documents could never include a taking of title in full satisfaction. That recognizes the truth that collateral value may change over time. It may be subject to disputes. And the debtor must consent.

And so this brings us back to the same reason why a lot of the Rooker-Feldman arguments are wrong because the wrong here was Lester seeking a strict foreclosure and then company consenting to it. Both are wrong. They were something -- that was a separate transaction from the loans,

and it was not authorized. And in all substantive matter, it was fundamentally equivalent to a private sale of the company. There was -- they didn't even go through a public auction like in the Genger case which is, you know, a notable one for them to cite because it shows how things are supposed to occur when there isn't even a trustee issue involved.

And so, here, rather than going through the -- you know, they knew they couldn't go that route. Maybe for whatever reason they ended up at this point where they just transferred Eber Metro to Alexbay and eliminated the debt. And that was a taking of trust assets, and they have not argued somehow that, you know, that Eber Metro, Eber Connecticut were not trust assets. They clearly were. They were on the trust statements given to trustees. And so, the only real defense is the interpretation of the will's language. On that one, I come back to the fact that it needs to be strictly construed.

And there are a number of options that were available so that the Court could not conclude that any kind of -- even a foreclosure with a public action was not necessarily required. Why? Because in bankruptcy law, which existed at the time the trust was settled, a secured creditor has priority over unsecured creditors. So there is value to the trustee in lending money and getting it secured that is short of foreclosure.

In fact, and the Court doesn't need to reach this because again they did the consensual strict foreclosure rather than going through a regular foreclosure. But the law is certainly not one that has ever said that a fiduciary, especially a trustee, could do something that would be potentially or even arguably detrimental to the trust where the company as a controls without going through some sort of a process when he's acting out of self-interest.

So that's the key is they don't deny that Lester was acting out of self-interest every step of the way when it came to securing the loans and after they'd already been agreed to notably and when it came to foreclosing on the loans, nor is there any dispute and this is where the consent aspect comes into play. Your Honor said that the issue that we have with the transaction is they could have been worth more. That's not it. The fact is Lester not only had the option, you know, to try to foreclose under the statutory authority, but he could have done what the other trust that had loaned money did, which is to extend the loan. And it is undisputed that there was not even an attempt made by either Lester or any of the directors of the company or other officers to try to renegotiate the terms to extend it to avoid default.

And that is when we turn now to even if the good faith is the standard, this was a self-dealing transaction that does not pass even the business judgment rule from much

less the entire fairness doctrine from the perspective of Eber Brothers Wine & Liquor because they are argue themselves it was insolvent and they made a preference for one creditor who happened to be Lester Eber himself leaving all the other creditors potentially out to dry.

So, how on earth is that fair to Eber Brothers Wine & Liquor Corp from its perspective to leave it with tons of debt, no assets? One of the cases that I eventually got led to and it's aptly named Odyssey is a case, I have the citation here somewhere, but it's -- I could provide it later if I need to. But it was cited in the briefs that I found for the Gunnerman case. And it's actually a relatively on-point case in more respects except for one. It involved a secured creditor who was also a majority shareholder of a Delaware company and he -- the secured creditor, it was -- I'm not going to say he but it was a --

THE COURT: Is this case cited in your briefs?

MR. BROOK: I only found it yesterday, Your Honor.

THE COURT: Okay. Because it's already five, so --

MR. BROOK: I can forego it.

THE COURT: -- if you can wrap up quickly.

MR. BROOK: Sure. The point is that ultimately a secured creditor has a lot of different powers and options, but there's no case law that says a secured creditor can take off their hat as a trustee or such at the same time. Making

the loan, securing the loans, Lester was able to do that out of self interest. If he wanted to release -- with a conflict of interest. The trust document acknowledges that explicitly.

But in terms of finding other options or using that power to maneuver himself into position to acquire ownership to violate the basic terms of what Alan Eber specified should happen upon the death of his three children, that was what was wrong. That is what is something that should be easily resolved on summary judgment because it's a matter of law interpreting the will. Is there a way to strictly construe it that required him to actually take ownership of it. And it can't be given the UCC and the language of both the will and the backdrop of course of trust law.

THE COURT: Okay. Thank you.

MR. BROOK: Thank you.

THE COURT: Mr. Herbert?

MR. HERBERT: All of the references that Mr. Brook made to Section 9-610 of the UCC are completely irrelevant to this situation. There's two different ways to foreclose on a loan under the UCC. One is Section 9-610 which is effectively a public sale in different flavors. The other -- it has nothing to do with what happened here. The other one was Section 9-620 which is a negotiated foreclosure basically with the consent of the company. So whatever might have been the case under 9-610 has nothing to do with what happened here.

Zero.

He said that a secured creditor under the UCC doesn't have any right to acquire the collateral. Well, I don't know if that's really right. I mean in the first place, the front end of any loan he's given a security interest, he's given possession of the collateral, and he has contractual and legal rights under the UCC to basically take and keep the collateral. And in this case all he needed to do was give a notice to the company and to certain creditors and either get the company's consent to it or have the company not object. So I call that pretty close to having the right to acquire a collateral.

He cited this case Dabney v. Chase Manhattan Bank. The last time I looked that case had nothing to do with any secured creditor. The bank, Chase Manhattan Bank, there whose conduct was at issue was an unsecured creditor. It had nothing to do with secured creditor's rights. In any event, the case was decided ten years before the UCC was even adopted in New York so I'm not sure what relevance it has.

The Gunnerman case, a Delaware case, that creates a lot of stir when it came out. That stands for the proposition that if you're a secured creditor and you've got a pledge of the stock of your borrower, you don't have to get shareholder approval of the borrower in order to foreclose and sell the collateral to somebody else. And the reason is because

there's a specific provision in Delaware, both Delaware and New York law that says if you -- you don't need to get shareholder approval to secure the loan in the first place so it wouldn't make any sense to do it [indiscernible]. That's all really that that's about.

Just skipping around here, what was said about the consulting agreement about how this treasure troll of cash would have been available for the company, well, that's not correct at all. The record shows that the people from Southern testified that they were not going to enter into any consulting agreement with the company. So that scenario where cash would have been going to the companies instead of to Lester, that's never going to happen because they said they would never have done that deal in the first place.

The point that Mr. Brook made about, well, Lester should have just been a good guy and extend the term of the loan, well, it's easy to say that here in this courtroom but when you're managing a business that in 2005 had revenues in the hundreds of millions of dollars and then these fine gentlemen from Southern Wine & Liquor showed up and stole your whole business, right, and you're sitting there with millions of dollars in third-party Legacy liabilities and you've got three and a half million dollars of your own money in the company, what kind of incentive do you think you're going to have to say, sure, pay me another ten years. I don't care.

The point was that all his other creditors were about, as I said earlier, about to come for him. The Teamsters, as we said in our latest, they said that they were ready, willing, and able to come over and start seizing the assets of the company any time in 2011, right. So what creditor would say, oh sure, I'll just extend my loan. You would have just gotten wiped out is all it is. The Teamsters would have wiped out the company, the company would have failed.

I appreciate what Mr. Brook said, but he doesn't understand the factual situation of what was going on. They were ready to go out of business. Something had to be done here, and the only person who saved this company from death was Lester Eber.

So, the point was also made that somehow that this foreclosure in 2012 favored one creditor and left the company holding the bag with respect to -- left all the other creditors hanging out to dry, that's absurd. After the 2012 foreclosure, Lester Eber made another three-plus million dollars worth of loans or advances to the company to pay off or settle with all of those creditors which Mr. Brook claims were left out to dry. That was the whole plan here was to stop the bleeding in 2012 and then work towards settling with all these third-party creditors. And that's exactly what happened.

And I can tell you from -- as the only person in the courtroom here who's a veteran of the, you know, five years of negotiation with the PBGC, that was quite an accomplishment. I mean I'm sure you know what those people are about, you know. Try to negotiate with somebody who has no incentive to sell and no budget, you know, no limitations on their budget. See where you get.

He cited -- and throughout here he cites the facts and all these other "no further inquiry" cases. He tries to compare the facts here with the facts in other cases. I again point out that in his own favored case, Meinhard v. Salmon, Judge Cardozo specifically said don't do that. He said it's fruitless effort here to try to dissect the existing cases as a way to resolve a new case. You have to look at the facts of your case more so than the normal case.

And the one thing I should mention here, I'm just going to direct this off the wall [indiscernible], I am surprised to hear that Mr. Kleeburg communicated with Mr. Slocum in the last couple of days because -- and I would suggest to them that they study the precedents because you'll find in the M&A world that there are cases where the disgruntled former employee world goes off and tries to team up with somebody else to take over control of his former employer has gotten a lot of other people into trouble. So I would suggest that you educate yourself about that.

And that's what we have.

THE COURT: Okay. Mr. Brook, I'll give you the last word. Keep it short, please.

MR. BROOK: I know it wasn't in our briefs, but I do want to give the Court the citation for Odyssey Partners LP v Fleming Companies, Inc., 735 A.2nd 386 (Del. Ch. 1999). And that is a case where like in Genger, it was a secured transaction. Ultimately, the Court concluded that there the majority stockholder never exercised control over the board and, thus, there was no duty of loyalty. But it definitely recognized that even though there was compliance with the UCC, there was a public auction that these duties overlap.

THE COURT: Okay. So this is what I'm going to do. I'm going to allow you to submit that case. You should submit that by Friday. I'll allow Mr. Calihan to submit the section on the UCC. You should do that by the end of this week. And you each, you can submit letter no more than two pages if you want to make a response to that Restatement section. That should be filed within a week. And to the extent that defendants want to respond to the Odyssey case, you may do that in a two-page -- no more than a two-page letter also within a week. Okay?

MR. BROOK: Okay.

THE COURT: Thank you all --

MR. BROOK: Thank you, Your Honor.

THE COURT: -- for your briefing and well-prepared arguments. We're adjourned.

MR. CALIHAN: Thank you for your patience.

* * * * * *

I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.

Shari Riemer

Shari Riemer, CET-805

Dated: January 13, 2020